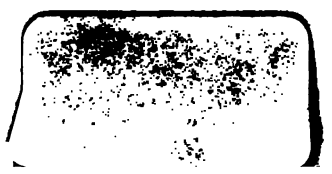

# REPORTS

OF

# CASES

ARGUED AND DETERMINED

IN THE

# HIGH COURT OF CHANCERY

DURING THE TIME OF

## LORD CHANCELLOR COTTENHAM.

BY

J. W. MYLNE, AND R. D. CRAIG, ESQS.

BARRISTERS AT LAW.

VOL. III.

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☞ *The Reporters request that the Purchasers of Vol. II. will at once correct an error which has crept into the last line of page* 708. *of that volume, in which the word "now" is printed by mistake for "not."*

# MEMORANDA.

Sir *James Allan Park*, one of the Justices of the Court of Common Pleas, having died during the *Christmas* Vacation 1838, the Right Honourable *Thomas Erskine*, the Chief Judge of the Court of Review, was shortly afterwards appointed to the vacant seat on the Bench. In the Vacation after the following *Hilary* Term, *William Henry Maule*, Esq., one of her Majesty's Counsel, was, on the resignation of Sir *William Bolland*, appointed one of the Barons of the Court of Exchequer.

*George Boone Roupell*, Esq., one of the Masters of the Court of Chancery, died in the month of *January* 1838, and *Andrew Henry Lynch*, of the *Middle Temple*, Esq., Barrister at Law, was some time afterwards appointed to the vacant office. In the Vacation after *Hilary* Term 1839, *Samuel Duckworth*, of *Lincoln's Inn*, Esq., Barrister at Law, was also appointed to the office of a Master in Chancery, on the resignation of *Francis Cross*, Esq.

In the Vacation after *Hilary* Term 1839, the following gentlemen were appointed her Majesty's Counsel, viz. *John Stuart*, of *Lincoln's Inn*, *Robert Vaughan Richards*, of the *Inner Temple*, *Samuel Girdlestone*, of the *Middle Temple*, and *Griffith Richards*, of the *Inner Temple*, Esquires. *William Goodenough Hayter*, of *Lincoln's Inn*, Esq., at the same time received a patent of precedence.

## ERRATA.

In vol. ii. p. 708., last line, for "now," read "not;" so that the sentence will run thus, —

"a charge by the will is not inoperative, in consequence of that act."

In this volume, p. 196., line 15., after "*pro confesso*" insert "for want of an answer."

p. 428., line 2., for "asking relief," read "asking no relief."

Lord COTTENHAM, *Lord Chancellor.*

Lord LANGDALE, *Master of the Rolls.*

Sir LANCELOT SHADWELL, *Vice-Chancellor.*

Sir JOHN CAMPBELL, *Attorney-General.*

Sir ROBERT MONSEY ROLFE, *Solicitor-General.*

A

# TABLE

OF

# CASES REPORTED

IN THIS VOLUME.

Mansfield,

# REPORTS

OF

# CASES

ARGUED AND DETERMINED 1837.

IN THE

## HIGH COURT OF CHANCERY.

### MOTLEY *v.* DOWNMAN. *July 5.*

UPWARDS of sixty years ago, the business of a tin-plate manufacturer was carried on by *Robert Morgan*, at certain works, situate at *Carmarthen*, of which he was the owner. He devised the works, in fee simple, to his son *John Morgan*, by whom they were carried on; and the same business was subsequently continued at the same works by certain persons in partnership, under the firm of *Morris, Morgan* and Co., who had a lease of the works from the proprietor, which expired on or about the 31st of *December* 1820, when the partnership was dissolved. The tin plates, manufactured at these

The boxes of tin plates made at particular works at *Carmarthen* were, for a long series of years, branded with the mark "*M. C.*" *S.*, a lessee of those works, who had used that mark, subsequently removed his manufactory to other works, at a distance of forty miles, and there used the same mark. The *Carmarthen* works were, for some years, unoccupied; but afterwards *D.*, and others as copartners, having taken a lease of them, carried them on, and branded their boxes with the mark "*M. C.*," and styled themselves "The '*M. C.*' Tin Plate Company." *S.* then obtained an injunction to restrain *D.* and his partners from using the mark "*M. C.*," or the designation of "The *M. C.* Tin Plate Company;" but, upon appeal, the injunction was dissolved, with liberty to *S.* to bring an action.

Principles and rules upon which the Court interferes, by injunction, in such cases.

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these works, were packed for sale in wooden boxes, according to the custom of the trade; and, from the earliest period to which the memory of any person acquainted with the works could reach, namely, from a period sixty years ago and upwards, up to the time of the dissolution of the partnership of *Morris, Morgan* and Co., the boxes containing the tin plates manufactured at the works at *Carmarthen* were always branded with the letters "*M. C.*" During the continuance of the before-mentioned lease, no other manufacturer of tin plates used the same mark; and the tin plates made by *John Morgan*, and by *Morris, Morgan* and Co., at the works at *Carmarthen*, became known by the designation of "*M. C.* tin plates."

When the partnership of *Morris, Morgan* and Co. was dissolved, one of the Plaintiffs, *Robert Smith*, who had since the year 1814 been a partner in that firm, took a lease of the works, for seven years, from the 1st of *January* 1821, in conjunction with a person named *John Reynolds;* and they commenced the business of tin-plate manufacturers there, under the firm of *Reynolds* and *Smith*, having purchased from the individuals who had composed the firm of *Morris, Morgan* and Co. the good-will of their business, and their stock in trade, and tools, including the irons used for branding the boxes with the mark "*M. C.*" In the month of *November* 1824, *Reynolds* relinquished his share in this new firm to his partner, the Plaintiff, *Robert Smith*, who then took into partnership with himself his brother, *Thomas Smith;* and the same business was thenceforward continued at the same works at *Carmarthen*, under the firm of *Robert Smith* and Co., until a period in or about the year 1825, at which, *Thomas Smith* having retired from the partnership, the Plaintiff, *Robert Smith*, removed his manufactory of tin plates from *Carmarthen* to other works in the parish of *Margam*, in *Glamorganshire*, which is distant

tant about forty-four miles from *Carmarthen;* and from that time to the present he had carried on that business at *Margam*, under the firm of *Robert Smith* and Co., having been from time to time joined in partnership by the several other Plaintiffs in this suit, who now formed, together with himself, the firm of *Robert Smith* and Co.

From the time at which *Robert Smith* so removed his works to *Margam*, until the early part of the year 1836, the manufactory at *Carmarthen* was closed; but *Robert Smith* retained the lease until the time at which it expired, namely, at the end of the year 1827. Ever since the time at which the firm of *Morris, Morgan* and Co. was dissolved, *Reynolds* and *Smith* and *Robert Smith* and Co. had used, first at *Carmarthen*, and subsequently at *Margam*, the distinguishing mark of "*M. C.*," which had been branded on their boxes of tin plates, and that mark was still used by the Plaintiffs.

In the month of *November* 1827, *Charles Morgan*, Esq., and his niece, the Honourable Mrs. *Yelverton*, were the joint owners of the *Carmarthen* works; and *Charles Morgan* then caused to be inserted, in several successive numbers of the newspaper called "*The Cambrian*," an advertisement, of which the parts material for the present purpose were to the following effect:—

"*M. C.* Tin Plates.

"To be let, and entered upon on the 1st day of *January* next, all those well-known and established tin mills, charcoal iron furnace, forge, bar iron and rolling mills, with convenient offices and appurtenances, called the *Carmarthen* Tin and Iron Works, where the tin plates bearing the mark "*M. C.*" (to which so decided a pre-

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ference has been given in every market in *Europe*) have been made nearly a century, and where only they can be legally manufactured, together with two other iron forges now held with them, all of which are situate in a country abounding with iron-stone, cordwood, and a never-failing supply of water. The above-mentioned tin works have made from 500 to 600 boxes of tin plates per week, and may be worked to a greater extent."

In "*The Cambrian*" of the 1st of *December* 1827, the following advertisement was placed immediately underneath that which has been already stated: —

"*M. C.* Tin Plates,

"Established for their good quality, since the year 1807 and 1808, are exclusively manufactured by *Robert Smith* and Co., at their *Margam* iron and tin plate works, where they have been made for the last three years under the same superintendence as formerly; and, to prevent fraud, the proprietors have added the brand mark '*Margam*' on each box."

*Charles Morgan* then caused the following letter to be inserted in "*The Cambrian*" of the 8th of *December* 1827: —

"*M. C.* Tin Plates.

"To the Editor of the '*Cambrian.*'

"Sir, — Observing in your last paper, immediately under an advertisement for letting the *Carmarthen* Tin and Iron Works, a paragraph by Messrs. *Robert Smith* and Co., relative to the brand mark '*M. C.*,' the exclusive property of the *Carmarthen* tin mills; and wishing to correct the representation contained in it, I shall thank you to state, in your next publication, and directly under

under the paragraph, if repeated, that, treating as I do Mr. *Robert Smith* and his machinations with merited contempt, I disdain to notice the impudent statement he has made respecting the right to the use of the mark '*M. C.*' at *Aberavon* (which place, for purposes easily discerned, has lately been called '*Margam*') except through the medium of the Court of Chancery, to which an application shall, in due time, be made, the result of which will more effectually prevent fraud than the word '*Margam*' stamped on the boxes, and convince Messrs. *Smith* and Co. of the illegality of their usurpation of the established brand mark '*M. C.*,' should temerity, after the expiration of the lease of the *Carmarthen* tin mills, induce them to use it.

"*Furnace House*, "I am, Sir,
"*Carmarthen*, "Your obedient Servant,
"*December* 5th, 1827. "CHARLES MORGAN."

No further steps were taken to restrain *Robert Smith* and Co. from using the mark "*M. C.*" The reason for this forbearance, as given by *Charles Morgan*, in an affidavit sworn in the cause, was, that the works remained unoccupied until they were taken by the Defendants in the year 1836, shortly before which time he had conveyed his interest in the works to Mrs. *Yelverton*, upon a partition. In or about the month of *March* 1836, the Defendants, *Hugh Herbert Downman* and others, took a lease of the *Carmarthen* tin works, and commenced the trade of tin-plate manufacturers there; and, on the boxes containing the tin plates manufactured there by them, they branded the mark "*M. C., Carmarthen;*" the word "*Carmarthen*" being branded in large legible characters on the same side of the box as the letters *M. C.*, and immediately under those letters, and in such a manner as to prevent the possibility of the mark "*M. C.*" being seen without the word "*Carmarthen.*"

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*then.*" The Defendants also assumed the name of "The *M. C.* Tin Plate Company."

On the 16th of *March* 1837, the present bill was filed by *Robert Smith* and Co. against *Hugh Herbert Downman* and his co-partners, alleging that the Plaintiffs had acquired an exclusive right to the use of the mark "*M. C.*," and charging that the tin plates now made by the Plaintiffs were well known in the market by the name of "*M. C.* plates," and were in great request, and held in high estimation, and had an extensive sale, and bore a higher price than common tin plates; and that the tin plates sold by the Defendants with the mark "*M.C.*" were greatly inferior in quality to the *M. C.* plates made and sold by the Plaintiffs; and that the character of the *M. C.* plates made by the Plaintiffs was in danger of being injured by the manufacture and sale of inferior plates bearing the same mark; and that the addition of the word "*Carmarthen*" to the letters *M. C.*, as used by the Defendants, afforded no protection to the Plaintiffs, seeing that the *M. C.* tin plates were originally and for many years made at *Carmarthen*, and that the *M. C.* tin plates were extensively sold in places where it was not known that the Plaintiffs were the manufacturers of the *M. C.* tin plates; and praying that the Defendants might be restrained by injunction from carrying on business under, or using the style or firm of the "*M. C.* Tin Plate Company," or any other style or firm which should import that they were the manufacturers of the *M. C.* tin plates, or from branding or setting upon the boxes of tin plates made by them, the mark "*M. C.*" either with or without any other letters, figures, or marks added thereto; and from exporting, selling, or disposing of any boxes of tin plates marked with such mark, and from otherwise using the same mark in their trade of manufacturing and selling tin plates.

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The charges of the bill above stated were repeated, in the same terms, in an affidavit sworn by the Plaintiff *Robert Smith* in support of the bill. He also stated, in the same affidavit, that at a meeting of the persons engaged in the tin trade, held at *Bristol*, in *November* 1836, the Defendant *Hugh Herbert Downman* announced himself and his partners as the makers of the *M. C.* tin plates; and that such announcement was the first intimation which the deponent and the other Plaintiffs had, that the Defendants were making use of the *M. C.* mark, although during three or four months preceding the month of *November* 1836, the deponent had been informed that such was the case. It appeared that some letters then passed between the parties, with reference to the use of the mark in question, and that the last of those letters was dated the 10th of *February* 1837.

It was stated, on affidavit, that the letters "*M. C.*" were originally intended to denote "*Morgan, Carmarthen.*"

Several old witnesses who deposed to the fact, that the mark "*M. C.*" had always been branded upon the boxes of tin plates made at the *Carmarthen* works, stated also that that mark was always considered as the mark belonging to the works; and another witness, who was the principal clerk to a tin plate merchant in the City of London, stated, that it was the practice for each manufactory of tin plates to have some peculiar mark, and that the deponent had ever considered the mark as incident to and denoting the works at which the plates were made, and not the manufacturer, and that such mark almost always bore reference to the place at which the manufactory was situated. The deponent then mentioned various instances in which tin plates were designated by marks, consisting of the names of the places or the ini-

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tial letters of the names of the places at which the works at which they were made were situated. The same witness also stated that, seven or eight years since, he had purchased tin plates of the Plaintiffs, and that such tin plates were marked "*M. C., Margam.*" The Defendant *Hugh Herbert Downman* stated, on affidavit, that he and his partners, before and at the time of their taking the works at *Carmarthen*, understood that the tin plates manufactured there had always been marked "*M. C.*" and had, under that mark, acquired a great celebrity in the principal markets of *Europe;* and that in taking the works he and his partners contemplated the resumption of the business formerly carried on at those works, and, as a matter of course, used the mark which had been customarily used there; and that the tin plates manufactured by him and his partners at the *Carmarthen* works were made of the very best materials, and were fully equal in quality, if not superior, to those manufactured at the Plaintiffs' works; and that the Defendants had never had any wish or intention to convey, to their customers or the public, any impression that their tin plates were manufactured at *Margam*, or in any way to pass off their plates as connected with the works of the Plaintiffs. And, in proof that such was the case, he referred to the addition of the word "*Carmarthen,*" which has been already mentioned; and the deponent expressed the willingness of himself and his partners to enter into an agreement binding themselves at all times to use the word "*Carmarthen,*" as well as the letters "*M. C.*" as the mark distinguishing the plates.

An affidavit sworn by *Charles Morgan*, stated that so long as he and his niece continued to be jointly interested in the *Carmarthen* works (viz. down to the year 1836), neither he nor (to his knowledge) his niece at any time abandoned the right which they and their tenants

tenants had theretofore always claimed of using the brand mark "*M. C.*" at the works, and that they always considered the use of that mark by the Plaintiffs as an act of injustice and unfair dealing.

Upon this evidence, the Vice-Chancellor, on the motion of the Plaintiffs, and after hearing counsel for the Defendants, granted an injunction in the terms of the prayer of the bill.

The Defendants then gave notice of a motion, before the Lord Chancellor, to discharge his Honor's order.

Several affidavits, sworn on the part of the Plaintiffs, after the Vice-Chancellor's order had been made, tended to shew that *M. C.* plates were ordered, by that designation only, without reference to the makers, or the place at which they were made; and stated, that although the word "*Margam*" was branded on the side of the Plaintiffs' boxes, yet, inasmuch as the mark "*M. C.*" was branded at the end of the boxes, and the word "*Margam*" at the side, the word "*Margam*" was not seen when the boxes were piled in bulk. Some of these affidavits tended to shew that some of the Defendants' plates, marked "*M. C.*," were of inferior quality.

On the other hand, further affidavits, sworn on the part of the Defendants, tended to shew that the plates now made at the *Carmarthen* works were of the very best quality, and superior to those made by the Plaintiffs.

The appeal motion now came on to be heard.

Mr. *Jacob* and Mr. *Hayter*, in support of the appeal motion.

Whether the Plaintiffs be entitled to use this mark or not, the history of the use of the mark itself, and of the *Carmarthen* works, sufficiently shews that the Plaintiffs

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tiffs cannot possibly have acquired an exclusive right to the use of the mark. The only rule, with respect to trade marks, is that one tradesman shall not be guilty of a fraudulent simulation of the mark used by another; but, in this case, there is no attempt to impute to the Defendants a fraudulent purpose of passing off their plates as being made by the Plaintiffs, or to prove that that result has taken place. It is, on the contrary, sworn, and not denied, that the Defendants' boxes are so marked that it is impossible to mistake them for those of the Plaintiffs.

The rule on this subject is the same in equity as at law. The first case in equity is *Blanchard* v. *Hill* (*a*), where an injunction was moved for to restrain the Defendant from making use of the *Great Mogul*, as a stamp upon his cards, to the prejudice of the Plaintiff, upon a suggestion that the Plaintiff had the sole right to this stamp, having appropriated it to himself in conformity with the charter granted to the Cardmakers' Company by King *Charles* the First. Lord *Hardwicke* held the charter to be illegal and void, except so far as it established the Company, and gave them power to make bye-laws; but he made some important observations upon tradesmen's marks. He stated that, with respect to the mark which the Plaintiff had appropriated to himself, there was no foundation for the Court's granting an injunction; and he added, "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it." He then went on to notice a case which had been cited to him, and is stated by Mr. Justice *Dodderidge* in *Popham* (*b*), in which it had

(*a*) 2 *Atk.* 484. (*b*) Page 144.

had been held, that an action at law would lie by a clothier against a person of the same trade, for using the same mark: but Lord *Hardwicke* pointed out the true distinction in that case, which was, that it was not the single act of making use of the mark that was sufficient to maintain the action, but the doing it with a fraudulent design to put off bad cloth by that means, or to draw away customers from the other clothier; and he added, that there was no difference between a tradesman or an innkeeper putting up the same sign, and a person's making use of the same mark with another of the same trade. In *Canham* v. *Jones* (*a*), a bill for an injunction stated that the plaintiff was possessed of the secret for making the medicine known as "*Velno's Vegetable Syrup*," and that the defendant sold a spurious preparation under the same name, alleging that it was the same medicine in composition and quality as that made by the plaintiff. A demurrer was put in to that bill, and the demurrer was allowed; and the Vice-Chancellor observed, in his judgment, that the bill did not state that the defendant professed to sell the plaintiff's medicine, but only one of as good a quality, which he was at perfect liberty to do. It is to be observed, that, in that case, it was alleged, not merely that a spurious article was sold, but that it was sold by the name of the genuine article. So, in *Singleton* v. *Bolton* (*b*), the plaintiff's father, and afterwards the plaintiff himself, had sold a medicine called "*Dr. Johnson's Yellow Ointment;*" and the defendant commenced selling the same medicine under the same name; whereupon the plaintiff brought an action against him; and Lord *Mansfield* held, first at the trial, and afterwards upon a motion for a new trial, that the action would not lie, no evidence having been given that the defendant sold it as if prepared by the plaintiff. In

(*a*) 2 *V. & B.* 218. (*b*) 3 *Dougl.* 293.

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In *Sykes* v. *Sykes* (*a*), the declaration stated that the plaintiff was a manufacturer of shot belts and powder flasks, which he was accustomed to mark with the word "*Sykes's Patent*," and that the defendants made shot belts, and powder flasks, which they also marked "*Sykes's Patent*," in imitation of the marks used by the plaintiff, and sold the articles so made and marked, as and for shot belts and powder flasks of the manufacture of the plaintiff. At the trial before Mr. Justice *Bayley*, it appeared that the plaintiff's father obtained a patent for the manufacture of the articles in question, which patent, however, had been held to be invalid, in consequence of a defect in the specification; but that the patentee, and afterwards the plaintiff, continued to mark the articles with the words "*Sykes's Patent*." It appeared also that the mark used by the defendants resembled, as nearly as possible, that adopted by the plaintiff. Mr. Justice *Bayley* held that the defendant had no right so to mark his goods, as and for goods manufactured by the plaintiff; and he left it to the jury to say whether the defendants adopted the mark in question, for the purpose of inducing the public to suppose that the articles were manufactured, not by them, but by the plaintiff. These observations of Mr. Justice *Bayley* embrace the whole law upon this subject, and were afterwards supported by the language used by Lord *Tenterden* upon a motion for a new trial.

Even if, in the present case, the Defendants used the mark "*M. C.*" without any addition, the Plaintiffs would have no more right to restrain them from so doing, than the plaintiff in *Canham* v. *Jones* had to restrain the defendant there from using the name of "*Velno's Vegetable Syrup*." The fraud, if any, is on the

(*a*) 3 *B. & C.* 541.

the side of the Plaintiffs, who have persisted in using a name which was appropriated to the works now held by the Defendants.

At all events, the Vice-Chancellor's order cannot stand in its present form, for it does not even put the Plaintiffs upon the terms of establishing their right by an action at law.

Mr. *Wigram* and Mr. *James Parker*, in support of the Vice-Chancellor's order.

When a man makes use of a mark which another man has previously appropriated to goods of his own, and he knows that the world will be deceived, the Court will presume fraud. *Sykes* v. *Sykes* proves this. It is clear that when a mark on goods has been used by one man, and the public have acquired a knowledge of it, no other man can use the same mark; it is in fact writing one man's name on another man's goods. The adoption of a mark used by him is as much writing his name, as if his surname or his initials, or any other designation by which he might be known, were employed. These positions are established, not only by *Sykes* v. *Sykes*, but also by the case in *Popham*, which has been mentioned on the other side, and by *Blofeld* v. *Payne* (*a*), where a manufacturer of metallic hones maintained an action against another manufacturer of the same article, who had imitated his envelopes; and by the case of *Day* v. *Day*, mentioned in *Eden on Injunctions* (*b*), where a manufacturer of blacking was restrained from using labels in imitation of those employed by the plaintiff. When, however, a manufacturer abandons the use of a particular mark, any one else

(*a*) 4 *B. & Adol.* 410. (*b*) Page 314.

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else has a right to adopt it. So, if the owners of the *Carmarthen* Tin Works had a right to the use of the mark "*M. C.*," they abandoned it at the time at which the works were shut up; and the Plaintiffs then adopted it.

The tin with which these tin plates are made is brought from *Cornwall*: the plates are not manufactured at the places at which the tin is found. The question, therefore, which the buyers ask, is not, at what place they are made, but by whom they are made. The mark "*M. C.*" has, for a great many years, been used by the Plaintiffs, and it is known to designate certain particular makers, who are, in fact, the Plaintiffs. The public are defrauded by the use of this mark by the Defendants; and a fraud upon the public operates as a fraud upon the Plaintiffs.

*The* LORD CHANCELLOR.

The Court, when it interferes in cases of this sort, is exercising a jurisdiction over legal rights; and, although, sometimes, in a very strong case, it interferes, in the first instance, by injunction, yet, in a general way, it puts the party upon asserting his right by trying it in an action at law. If it does not do that, it permits the Plaintiff, notwithstanding the suit in equity, to bring an action. In both cases, the Court is only acting in aid of, and is only ancillary to, the legal right. I can hardly conceive a case in which the Court will at once interfere by injunction, and prevent a defendant from disputing the plaintiff's legal title. The present order interposes the injunction, and does not put the parties in a situation to try the question at law.

Now, undoubtedly, if the case had stood upon the use of the mark "*M. C.*" by the Plaintiffs, and there had been

been nothing but the fact of another company, forty miles off, assuming the same mark, then, although the name of the place were added by the latter, yet, if, practically, that addition did not protect the Plaintiffs from having it supposed that the goods so marked were theirs, it would not afford an answer to the charge; for the distinction must be such as would protect the Plaintiffs from the injury they might sustain from a deception practised on the public; and it is immaterial what contrivances are used, if that be, in fact, the effect of the use of the marks by the Defendants.

But the great difficulty, as it strikes me, in this case, is, that although the works did not bear the name of "*M. C.* works," still the persons who, from time to time, from the earliest period, have carried on the works, have used that mark to distinguish the plates made there. Then Mr. *Smith* became lessee of the works; and, while he was lessee, he used, as a matter of course, the mark which had always been the distinguishing mark of the tin plates made there. It answered his purpose to quit the works at *Carmarthen* before the expiration of the lease, and to establish a similar manufactory forty miles off; and there he used and has continued to use the same mark which he had used, when at *Carmarthen*, to denote the goods which he manufactured there. It appears that the owner of the property, as soon as the lease expired, remonstrated against Mr. *Smith*'s continuing to use the mark which had always been used to designate the tin plates manufactured at the *Carmarthen* works. And well he might, because, if, by the successful manufacture of the persons who had carried on those works, the goods made there had acquired an extraordinary value, it was an extraordinary value which attached to the premises on which the works were carried on; and, no doubt, when the owner came to dispose of the works again, the circumstance of the reputation which the manufacture of those

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those works had acquired would enable him to dispose of them on more advantageous terms. It happened, however, that no tenant was immediately found for the works at *Carmarthen;* or, at least, no one carried on the business there from the end of the year 1827, when Mr. *Smith*'s lease expired, until the early part of the year 1836, during all which time the Plaintiff, Mr. *Smith*, certainly used the mark; but that was under a protest by the owner of the works at *Carmarthen;* and, therefore, it cannot be considered that there was acquiescence on the owner's part. Then it appears, that, about the month of *June* 1836, these works having been again let, the manufacture was re-commenced. In one of the affidavits upon which the injunction was obtained, the Plaintiff, Mr. *Smith*, said that he had been positively informed in *November* last that such was the case, but that he had heard of it three or four months before. The latter circumstance is, no doubt, true, particularly as it is stated by the Plaintiff (*Smith*) himself; and it is almost impossible that he could be ignorant of it, for he knew that the landlord of the *Carmarthen* works claimed a right, not only to use the mark in question, but to use it exclusively. When he found, therefore, that the works were re-let, undoubtedly he must have been aware that the tenant took the premises with the intention of using the mark. I do not say any thing as to the interval which elapsed between *November* and the time at which the bill was filed, because a considerable part of it seems to have been occupied in correspondence.

The case, then, is, that a person who, as tenant of particular works, had derived the benefit of using the distinguishing mark employed for the purpose of marking the goods made there, quits the premises, and establishes a similar manufactory elsewhere, and there, after his lease of the previous works has expired, uses the mark which he had obtained the right to use, or at least the

the benefit of using, by being tenant of those works; and then he says to the landlord of those works, "Not only have I acquired the right to the use of this mark, but you have lost the right to the use of it."

Mr. *Wigram* said, that the Plaintiffs have acquired a celebrity by their manufacture of tin plates, designated by this mark; and that persons have, for several years, been in the habit of purchasing the Plaintiffs' tin plates by this mark; but the real question is, whether the Plaintiffs have acquired a right to prevent other subsequent tenants of the works at *Carmarthen* from using a mark, which it is clear was originally derived from those works; for, although they were not called "*M. C.* works," yet the persons carrying on the manufacture of tin plates at them, have always used the mark "*M. C.*"

The question is one of considerable nicety, and has never arisen in any of the cases which have been cited, and, therefore, the Court should be very sure before it concludes the right by injunction, particularly without providing for the trial of the legal right.

I think, therefore, that the proper order to be now made will be, to discharge the order for the injunction, giving the Plaintiffs liberty to bring an action, as they may be advised; it being understood that the Defendants are not to be prejudiced in the mean time. There will be liberty for both parties to apply, and the costs must be reserved.

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*July 5.*

## The Earl of MILLTOWN *v.* STEWART.

In the year 1827, a bond to secure the payment of a sum of money was given to *S.* by *L. M.* joined in the bond, as surety. In 1829 *L.* died. In 1832 *S.* brought an action in *Ireland* against *M.* upon the bond, and *M.* then filed a bill in *Ireland* for an injunction, to restrain the action, on the ground that the bond was founded on a gambling transaction. An injunction was granted, and subsequently a decree *nisi* for taking the bill *pro confesso* was made against *S.*, and the order was served upon him two days before his death, which happened in 1833. In 1837 *S.*'s personal representatives brought an action upon the bond against *M.* in *England*. *M.* then filed a bill for an injunction. *S.*'s representatives, in their answer, stated that they were entirely ignorant as to the natureof the consideration for the bond, and that they had found among *S.*'s papers certain memorandum books relating to bets upon horse races, which books they had destroyed as useless; but they denied that the books shewed the consideration for the bond. Upon this answer the Vice-Chancellor granted an injunction, which was continued upon appeal, without obliging the Plaintiff to bring the money into Court.

THE bill stated that, sometime in the month of *June* 1827, the Plaintiff's brother, *Henry Leeson*, now deceased, represented to the Plaintiff that he had lost large sums of money to *Robert Raymond Stewart*, at various games of chance, particularly betting on horses which had run at several of the race courses in *England*, and that *Robert Raymond Stewart* had pressed him for payment thereof; and he requested the Plaintiff to join him in a bond to *Robert Raymond Stewart* for the amount of the sum so lost; *Henry Leeson* at the same time representing to the Plaintiff, that the Plaintiff would never be called on for payment on account of the bond. The bill went on to state that the Plaintiff, jointly with *Henry Leeson*, on or about the 10th of *June* 1827, executed his bond to *R. R. Stewart*, in the penal sum of 4800*l.*, conditioned for the payment of the sum of 2400*l.*, the amount of the sum so lost by *Leeson* to *R. R. Stewart*, as the Plaintiff best recollects, with interest at 5 per cent. per annum: that *Leeson* died on the 29th of *May* 1829; and that the Plaintiff never heard further of the bond until the month of *September* 1831, when he was applied to for payment on behalf of *R. R. Stewart*, although the Plaintiff had believed, and was convinced that the bond had long before been satisfied by *Leeson*.

The

The bill went on to state that the Plaintiff did not receive any pecuniary or other consideration for executing the bond, nor did *Leeson*, as the Plaintiff believed, receive any legal, fair, or other consideration, saving as aforesaid, for the same; and on the contrary the Plaintiff expressly charged, that the only consideration given by *Stewart* for the bond was money won from *Leeson* by *Stewart*, by betting at horse races and other games as aforesaid; notwithstanding which, *Stewart*, in the latter end of the year 1831, or the beginning of the year 1832, caused an action to be brought against the Plaintiff, in the Court of King's Bench in *Ireland*, for the amount for which the bond was executed, and interest; and that, under these circumstances, the Plaintiff, in the month of *January* 1832, filed a bill against *Stewart*, in the Court of Chancery, in *Ireland*, praying that the bond might be brought into Court to be cancelled, or otherwise dealt with as the Court might think fit, and that *Stewart* might be restrained from proceeding in any manner to recover the amount thereof: that on the 3d of *February* 1832, *Stewart* appeared to that bill; and that on the 7th of the same month an injunction was obtained to restrain him from issuing execution till answer and further order; but he was to be at liberty to call for a plea and proceed to trial in the action: that *Stewart* neglected to answer the bill, whereupon process of contempt, to a sequestration, issued against him; and the sequestrators having returned *nulla bona*, the cause was set down to be heard on the sequestration and return, in order that it might be taken *pro confesso*: that on the 29th of *June* 1833, a decree was made by the Master of the Rolls in *Ireland*, by which it was ordered that the bill should be taken *pro confesso*, and that *Stewart* should bring the bond into Court; and that he should abstain from proceeding in any manner to recover the amount of the bond, and that the Plaintiff might make up and enroll a decree

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with costs against *Stewart*, unless, on service on him of that decree, and a subpœna for that purpose, good cause should be shewn to the contrary, on some day in the then next *Michaelmas* term, to be mentioned in such subpœna; but that before the Defendant should be permitted to shew such cause, he was to purge his contempts, and pay to the Plaintiff the full costs out of pocket of obtaining that decree:

That on the 17th of *October* 1833, *Stewart* was personally served with copies of that decree and subpœna; but that he died on the 19th of *October* 1833, without having shewn cause against the decree, and without having proceeded to trial in the action; and that he had by his will, dated the 28th of *June* 1833, appointed the present Defendants, *Samuel Frederick Stewart* and *Catherine Laura Stewart*, his executor and executrix, by whom his will was proved in *England*, in or about the month of *November* 1833; but that it was not proved in *Ireland*:

That on the 28th of *February* 1837, the Defendants brought an action against the Plaintiff in the Court of Exchequer, in *England*, to recover the sum of 2400*l.* on the bond, with interest from the date of the bond.

The bill charged that *Stewart* never paid or allowed any good or valuable consideration for the bond, and, therefore, that the Defendants ought to be restrained from proceeding in their action, or from taking any other proceedings at law against the Plaintiff, in respect of the bond; and that the Plaintiff ought to have the benefit of the decree made in the *Irish* suit. The bill also charged that the Defendants had in their possession or power divers betting books, and other books and papers, relating to the matters in the bill mentioned, and whereby the truth of such matters would appear.

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The bill prayed that the Plaintiff might be declared to be entitled, as against the Defendants, to the benefit of the decree in the *Irish* suit, and that the bond might be delivered up to be cancelled, and that the Defendants might be restrained from proceeding at law upon it.

The joint answer of the Defendants stated, that *Stewart* annexed to his will a list of his property, and of his demands against certain individuals; and that such list mentioned that he held the Plaintiff's bond for 2400*l.*, which he had given to him some years since in conjunction with *Leeson;* adding that the Plaintiff made his brother's death an excuse for not paying the bond. The Defendants stated that they had taken possession of *Stewart*'s papers, and, amongst them, of the bond in question, and two draft copies of letters written by *Stewart* to the Plaintiff, relative to the bond, and a draft copy or extract of some letter written by *Stewart* to his solicitor or some third person, relative to some bill filed against him (*Stewart*) with respect to the bond, and a document purporting to be a copy of a decree *nisi* made by the Master of the Rolls in *Ireland*, on the 29th of *June* 1833, in a cause therein stated to be depending between the Plaintiff and *Stewart*, together with a copy of a subpœna to shew cause against such decree, dated the 12th of *October* 1833; and that such document contained statements relative to a bill filed by the Plaintiff against *Stewart*, which appeared thereby to have been to the effect mentioned in the bill in this suit; but the Defendants, except as therein appeared, were wholly ignorant as to the truth or falsehood of all the statements contained in such document. The Defendant, *Catherine L. Stewart*, stated, in the answer, that, in or about the month of *February* 1833, she heard *Stewart* say to several persons that the bond debt due from the

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Plaintiff had never been paid, and that he intended to go to *Ireland* to obtain justice; but the Defendants added, that *Stewart* was shortly afterwards taken dangerously ill, and was not allowed by his medical advisers to attend to business. The Defendants went on to say, that they believed that *Stewart* gave full, fair, and valuable consideration for the bond, which belief they grounded upon the fact, that *Stewart* was frequently in the habit of lending considerable sums of money to many of his friends; and that, upon many such occasions, he took from such friends a bond or other security of a like nature for the monies so advanced; and they stated that, in a letter addressed by *Stewart* to a party to whom he had so advanced money, he expressed himself thus; — "I shall accept of your bond for the amount of the monies I have actually advanced, and interest, of course, for two years; but I will not have it mixed up with any other demand, which, by any possibility, can affect its legality." The Defendants said, they verily believed that the bond had not been satisfied; for no trace of the receipt of the money could be found in *Stewart*'s cash books, or in his banker's accounts. The Defendants admitted that they had commenced an action against the Plaintiff, and intended to prosecute it.

The Defendants further stated that there were among *Stewart*'s papers, at the time of his death, several memorandum books, memoranda, and notes relating solely to bets on horse races between *Stewart* and divers individuals, and containing calculations upon horse races; and that the Defendants carefully examined and looked through the whole of such memorandum books, memoranda, and notes; and they positively said that the same did not in any manner shew how the debt for which the bond was given, or any part of it, arose, or what was the consideration, or any part of the consideration for the bond,

bond, or (with the exception of the fact, that *Stewart* had betted or laid wagers on horse races) the truth of the matters mentioned in the bill: and that one of the Defendants being fully aware, as the fact was, that such memorandum books, memoranda, and notes, were totally useless, and related solely to claims which were irrecoverable at law, did, at sundry times, in or about the year 1835, destroy the whole of such memorandum books, memoranda, and notes, as waste paper.

The Defendants admitted that the deaths of *Leeson* and *Stewart* happened at the times mentioned in the bill, and they admitted the date of *Stewart*'s will, and the probate of it, and that it had not been proved in *Ireland;* but they expressed entire ignorance of all the facts alleged and charged in the bill, and of the circumstances under which the bond was given, and of the consideration for it, except as already mentioned, or as appeared by the before mentioned documents or papers, which they still had in their possession.

Upon the coming in of the answer, the Vice-Chancellor, on the motion of the Plaintiff, granted an injunction to stay proceedings in the action at law which had been commenced by the Defendants.

The Defendants now moved that his Honor's order might be discharged.

Mr. *Jacob* and Mr. *Hetherington*, in support of the motion, contended that the Vice-Chancellor ought not to have granted the injunction, except upon the terms of the Plaintiff bringing the money into Court: that it could not be considered that there had been any decision in *Ireland* on the merits: that the order made in that country, to take the bill *pro confesso* against *Stewart*,

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was only in the nature of a penalty for his contempt: and that the question of the validity of the bond was properly triable in the action at law. They cited *Ball* v. *Storie.* (*a*)

Sir *W. Horne* and Mr. *Purvis, contrà.*

Mr. *Jacob*, in reply.

*The* LORD CHANCELLOR observed, that from the year 1829, when the principal obligor died, to the year 1832, no proceedings were taken upon the bond; that the Court had an undoubted jurisdiction to order a bond, given under such circumstances as were alleged in this case, to be delivered up; that *Stewart*, who knew what the consideration was for which the bond was given, was content to let the injunction issued in *Ireland* stand, and to let the order *nisi* for taking the bill *pro confesso* be made, without taking any steps to secure to himself the power of going on with his action; and then the Defendants, his representatives, although in possession of all his papers, by their answer to this bill said, that they were quite unable to state any thing about the consideration for the bond; and yet the Court was asked by the Defendants to let the action go on, and to let them obtain judgment upon the bond, upon the face of which none of these facts appeared.

His Lordship added, that the statements in the answer were amply sufficient to raise such a degree of doubt, with respect to the consideration, as to entitle the Court to prevent the action from at present proceeding.

With reference to the argument, that the injunction ought to have been granted only upon the terms of paying

(*a*) 1 *Sim. & Stu.* 210.

paying the money into Court, his Lordship said, it was very true, that if there be a legal debt, and only some equitable circumstances upon which the injunction is sought, the Court will not allow the debtor to retain the money in his own hands: but here, the question was, whether there was a debt at all. His Lordship was of opinion, that the action should not be permitted to go on, until the case should be in that state in which the Court could come to some conclusion as to the rights of the parties.

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Injunction continued. Costs of this motion to be costs in the cause.

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## Ex parte RAM.

*Aug.* 1.

When stock has been transferred to the Commissioners for the Reduction of the National Debt, in consequence of the dividends upon it not having been claimed for ten years, it is not a matter of course to order it to be re-transferred

IN the month of *July* 1822, a sum of 1422*l.* 17*s.* 6*d.*, 3 per cent. consols, was standing in the joint names of *Abel Ram* and *Stephen George Ram*. No claim having been made to the dividends which became due at that time, or to the dividends which became due from time to time throughout the succeeding ten years, the sum of stock in question was, in the year 1832, transferred to the account of the Commissioners for the Reduction of the National Debt, in pursuance of the act 56 G. 3. *c.* 60.

*Stephen*

to a person who subsequently makes out a legal title, upon which a transfer of the stock would have been made to him if the ten years had not elapsed.

Thus, where stock had stood in the joint names of two persons, of whom one had survived the other upwards of ten years, but had not, during that time, claimed any dividends, the Court would not, upon the petition of the widow and personal representative of the survivor, order the stock to be transferred into her name, or into the names of the two deceased persons; but directed the Master to inquire who was entitled to the stock, with liberty to state special circumstances.

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*Stephen George Ram* died in the year 1822, and *Abel Ram* in *January* 1833, and his widow, *Eleanor Sarah Ram*, then took out letters of administration to his effects. She subsequently applied to the Bank of *England* to retransfer to her the before-mentioned sum of stock; but this they refused to do, without the authority of an order of the Court of Chancery. *Eleanor Sarah Ram* then presented a petition, praying that the stock might be re-transferred into the names of *Abel Ram* and *Stephen George Ram*, or into her own name; and that the dividends which had already accrued, and should afterwards accrue, might be paid to her.

Upon this petition, the Vice-Chancellor ordered, that the stock should be transferred into the name of the petitioner, and that the dividends already accrued, and afterwards to accrue, should be paid to her.

The Attorney-General and the Commissioners for the Reduction of the National Debt appealed from this order.

The *Solicitor-General* and Mr. *Wray*, in support of the appeal, said, that the question upon the appeal was, whether the claimant had made out such a title as was contemplated by the act of parliament. (*a*) They argued that,

(*a*) The fifth section of the *56 G. 3. c.* 60. is in the following words:—"And be it further enacted, that it shall be lawful for the governor or deputy governor of the Bank of *England*, for the time being, to authorise and direct the accountant general or secretary of the said governor and company, for the time being, to retransfer any such capital stock to any person or persons who shall shew, to the satisfaction of such governor or deputy governor, his, her, or their right or title thereto, and to pay the dividends due thereon; and also to pay any such lottery prizes or benefits, and principals of stock and annuities as aforesaid, as if the same had not been transferred or paid to the

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obliged to make good the amount to some subsequent claimant. It appeared most probable that the two persons, in whose joint names the stock formerly stood, were trustees of it; and if so, it could not have been the intention of the legislature that the stock should be re-transferred into the name of any person who happened to be the legal personal representative of the last surviving trustee, when it did not even appear that there were any *cestuis que trust* in existence; and if it were trust property held for some persons unknown, the Crown would be entitled to it; and it would be absurd in such a case to transfer it into the name of a trustee, merely in order that the Attorney-General might file a bill to have it re-transferred. They cited *Ex parte Gillett* (*a*), and *Ex parte Lavell.* (*b*)

Mr. *Jacob* and Mr. *Roupell, contrà*, contended, that as the Bank of *England* never looked beyond the legal title, it was not to be supposed that the legislature intended that, in cases under this act, the Bank, who were to be the judges, in the first instance, of a party's title, should try that title in a different manner from that to which they were accustomed; and, as the proof of the legal title of the present claimant would have entitled her to have the stock transferred into her name, if it had not been transferred to the Commissioners for the Reduction of the National Debt, she was entitled to have a similar transfer made now: or, at all events, she was entitled to have it re-transferred into the names in which it stood at the time at which it was transferred to the Commissioners of the National Debt; and that a vague surmise that this might be trust property, and a still more vague suggestion that the Crown might possibly be entitled to the fund, for want of a beneficial owner,

(*a*) 3 *Mad.* 28. (*b*) 2 *J. & W.* 397.

owner, was not a ground upon which the Court would think it necessary to direct a special inquiry, such as was now asked.

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The act directed that a petition to this Court should be presented, if the Bank should not be satisfied of the "legality" of the claim; an expression which clearly shewed that it was only intended that the legal title should be established: a re-transfer, also, implied, by the very force of the term, the legal ownership. If, however, the equitable title were required to be found, it might be necessary to go through all the modes and forms of inquiry known to this Court, before all the beneficial claimants could substantiate their titles; and such a construction of the act would make it an instrument of confiscation, in all cases in which the sum was small, and the circumstances were complicated. The Respondent's counsel commented upon *Ex parte Gillett* and *Ex parte Lavell*, and relied upon *Ex parte Sir John and Lady Nicholl* (*a*) and *In re Bigg* (*b*), the latter of which cases, they submitted, was precisely the same as the present.

*The* LORD CHANCELLOR.

In questions of this kind, the course the Court adopts is matter of discretion, in every case which arises upon the act of Parliament. According to the Respondent's argument, however, the Court has no discretion. Suppose the petitioner had said that the two persons in whose name this stock stood were trustees, and that the petitioner was the representative of the survivor, but that she did not know who were the *cestuis que trust*, or whether they were in existence or not; even then, if the construction for which the petitioner contends were right,

(*a*) *T. & R.* 119. (*b*) 1 *Yo. & Coll.* 245.

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right, the Court would not be justified in refusing to order the stock to be transferred to her.

In the case of Sir *John* and Lady *Nicholl* (*a*), there was nothing to raise the suspicion of a trust at all. The stock was standing in the name of one individual, and there was nothing to raise a doubt as to that person's being beneficially entitled to it. In this case, however, there is every suspicion that the parties in whose name the stock stood were not beneficially entitled. First of all, no dividends were claimed from the year 1822 down to the time at which this petition was presented, although, from the year 1822 to the year 1833, the survivor of the two, being the person whom the petitioner represents, was living. And the petitioner now states facts which leave no doubt that the stock was held upon a trust, and does not state any persons to whom it beneficially belongs. Without laying down any general rule upon the subject, I am satisfied that this is a case in which it would not be safe to direct a transfer of the fund, without a previous inquiry as to the parties entitled to it.

The language of the act of parliament, if it were necessary to give an opinion upon it, quite shews the distinction intended between "legality" and "justice." The terms are as large as they well could be. It may not have been the practice of the Bank to inquire into more than the legal title to stock; but if they do not choose to take on themselves to decide upon claims on which there is any doubt — and of course they do not — then the Court of Chancery is to exercise that discretion.

I think that, in the present case, there is quite sufficient to render it proper that there should be a reference to the Master to inquire as to the title to this stock.

It

(*a*) *T. & Russ.* 119.

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of *Thomas March*, and in the event of his wife surviving him, to pay the whole of the dividends to *Prudence March*, for her life; and, after the death of *Prudence March*, whether in the lifetime or after the decease of *Thomas March*, to stand possessed of the bank annuities (subject to the trust for payment of the dividends of one third to *Thomas March* during his life), in trust for *George March* and *John March*, children of *Thomas* and *Prudence March*, and all and every other child and children of *Thomas March* by *Prudence* his wife, thereafter to be born, who should be living at the time of the decease of *Prudence March*, and the issue of such of them as should be then dead, leaving issue, in equal shares, such issue taking the shares to which their parents would have been entitled, to be vested interests when they should attain twenty-one, with benefit of survivorship. The deed contained a power, enabling *Prudence March* to appoint a new trustee, in the stead of any trustee who should die, or be desirous of being discharged, or refuse to act.

In the month of *March* 1810, *Thomas Grant* was appointed a trustee of the above-mentioned deed of settlement in the stead of *George Hodgson*, who retired from the trust; and the navy 5 per cent. stock was thereupon transferred into the joint names of *George Russell* and *Thomas Grant*.

Soon after *Grant*'s appointment as trustee, *Russell* and *Grant* transferred the stock into the name of *Russell* only, who subsequently sold it out, and applied the produce to his own use.

*Thomas* and *Prudence March* had no children besides those already mentioned, of whom *George* was born in

or

or about the year 1800, and *John*, in or about the year 1802.

In the year 1817, Messrs. *Collins* and *Waller*, the solicitors of *Thomas* and *Prudence March*, wrote to *Grant*, requiring that the stock should be replaced. To this demand *Grant* replied, in the following letter, addressed to *Prudence March*.

"Dear Madam,—I have received a letter from Messrs. *Collins* and Co., by your directions, demanding the immediate investment of the 1000*l.* stock, which you so much wished me to let Mr. *Russell* have; and, to oblige you, I complied with your request. You may depend upon it I shall act with justice to you and your sons, and the money shall be invested. I hope you will not insist on its being done immediately, for I have not got the money by me, it being in estates and in business. Give me time; then I will do the business to you and your sons' satisfaction: the sooner I can buy in the stocks the better it will be for me, as they keep rising. It is very hard upon me to be obliged to pay this money; but, as I am answerable, it shall be done. I ask for time, and I hope you will give it me. It cannot be your wish to distress me, as it will put me to great inconvenience to buy in the stocks immediately: you cannot be affeared of your sons' not having the money, as all my estates are liable for the amount. It is not my wish to give you any trouble on the occasion. I understood you, when I was in town, that if the interest was regularly paid, you would be satisfied. I am informed it is kept paid by Mr. *Russell*'s agent. If it is not, let me know. When I returned from *London* I was attacked with inflammation on my lungs, which laid me up for some time; I have not recovered it yet; therefore I cannot come to Town; but I hope the good weather will enable me to

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be there before long. I am sorry to say Mrs. *Matson* is very ill. Your answer will oblige,

" Dear Madam, your humble servant,

" *Thomas Grant.*

" Mrs. *March*, No. 33, *Moffatt Street, City Road, London.*"

In the year 1818, *Thomas* and *Prudence March*, and *George* and *John March*, their sons, then infants, by *Thomas March*, their father and next friend, filed a bill in Chancery, against *Russell* and *Grant*, for the purpose of compelling them to replace the stock; but that suit was compromised, soon after its institution, upon *Russell* giving additional security for the payment of interest for the time past, and for the punctual payment of interest for the future. *Grant*, however, had put in his answer to the bill, and had set forth in it a written document, purporting to be signed by *Thomas* and *Prudence March*, expressly authorising him to transfer the stock to his co-trustee, *Russell*.

*Grant* died in the year 1820; having, by his will, given all his personal estate, not specifically bequeathed, to his sister *Sarah Matson*, widow, and to *John Perkins* and *William Wise*, upon trust to convert it into money; and, after payment of his debts, to pay one third to *Sarah Matson*, and one other third to *Mary Smith*; and, as to the remaining third, to pay one third part of it to *Alicia Eliza Arrowsmith*, wife of *Thomas Arrowsmith*; and, as to the remaining two thirds of the last mentioned third, to invest it upon government or real securities, and pay the interest to *Alicia Eliza Arrowsmith* for life, for her separate use; and after her death to divide the capital equally amongst all her children, the shares of daughters being vested at the age of twenty-one, or at marriage, and

and the shares of sons at the age of twenty-one, with benefit of survivorship. *Sarah Matson*, *John Perkins*, and *William Wise*, were appointed executors of this will; and the will was proved, together with a codicil, by *Sarah Matson* and *John Perkins*, on the 18th of *July* 1820.

*Sarah Matson* died in the year 1830; having, by her will, given all the residue of her personal estate to *Sarah Prudence Arrowsmith*, spinster, and appointed *John Perkins* her sole executor, who afterwards proved her will.

*Mary Smith* also died, having appointed *George Ray* and *John Grant Smith* her executors, both of whom proved her will.

The present bill was filed, in the year 1833, by *George March* and *John March*, as the only children of *Thomas* and *Prudence March*, against *Russell*, *Perkins*, *Thomas Arrowsmith*, and *Alicia Eliza* his wife, *Sarah Prudence Arrowsmith*, who was one of the children of *Alicia Eliza Arrowsmith*, and also against her other children, against *Thomas* and *Prudence March*, against *Ray*, and against *John Grant Smith*, who was out of the jurisdiction of the Court; and it prayed that *Russell*, and *Perkins*, as executor of *Grant*, might be decreed to lay out the amount produced by the sale of the 1000*l.* 5 per cent. Navy Bank Annuities, or the value of that stock, in the purchase of stock, in the name of the Accountant-General, upon the trusts of the settlement; and that the rights and interests of the Plaintiffs, and of the Defendants, *Thomas* and *Prudence March*, in the stock so to be purchased, might be ascertained and declared; and that *Perkins* might either admit assets of *Grant*, or that the usual accounts of *Grant*'s personal estate might be

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taken; and that, in case it should appear, in taking such accounts, that any part of *Grant*'s personal estate had been received by *Sarah Matson*, *Mary Smith*, or the *Arrowsmiths*, as residuary legatees of *Grant*, then that the personal estate of *Sarah Matson* and *Mary Smith* might be charged with, and the *Arrowsmiths* might be ordered to refund a sufficient part of the personal estate so received, to answer the Plaintiffs' demands; and that *Perkins*, as executor of *Sarah Matson*, and *Ray* and *J. G. Smith*, as executors of *Mary Smith*, might admit assets of their respective testatrixes, or that the usual accounts of the personal estates of those testatrixes might be taken; and if it should appear that any part of the personal estate of *Sarah Matson* had been received by *Sarah Prudence Arrowsmith*, as her residuary legatee, then that she might refund the whole or a sufficient part of what she should so have received.

*Perkins*, by his answer, stated, that in the year 1823 *Grant*'s affairs were finally wound up by *Sarah Matson*, by whom alone his personal estate had been possessed, and that the net residue of 2036*l.* 11*s.* 4*d.* was appropriated by her, according to the directions of *Grant*'s will; the two thirds of a third, set apart for *Alicia Eliza Arrowsmith* and her children, being invested in the funds, in the joint names of *Sarah Matson* and *Perkins*; and that *Grant*'s personal estate was thus applied and administered, without his (*Perkins*'s) having any notice of the claim now made by the Plaintiffs in this suit. He admitted, also, that he had paid to *Sarah Prudence Arrowsmith* the clear surplus of *Sarah Matson*'s estate, being 129*l.* 15*s.* 11*d.* or thereabouts, but without any notice or knowledge of the Plaintiffs' claim, or of the circumstances under which it was now made; and that, in *January* 1833, he changed the security of that part of *Grant*'s estate, which had been set apart for the *Arrowsmiths*,

*Arrowsmiths*, from the funds to a mortgage. The statements of *Thomas Arrowsmith* and his wife, and such of her children as were of age, were to the same effect.

The Defendant *Ray*, by his answer, stated that he had possessed the personal estate of *Mary Smith* to a very small amount, and not sufficient to pay her funeral and testamentary expenses and debts, exclusive of the sum which the bill alleged that she had received as one of *Grant*'s residuary legatees; as to which he was unable to state whether it had been received by *Mary Smith* or not.

By the decree made in this cause, by the present Master of the Rolls, it was declared, that *Russell* and the assets of *Grant* were liable to make good the 1000*l.* Navy Bank Annuities, and to pay the Plaintiffs' costs of this suit; and an account of *Grant*'s assets was directed; and it was declared that his residuary legatees, to the extent of the sums received by them, were liable to make good the Plaintiffs' demand; and an account was directed of what had been paid to each of the legatees; and an account of *Sarah Matson*'s assets was directed; and it was declared that *Sarah Prudence Arrowsmith*, as her residuary legatee, to the extent of the sum received by her, not exceeding the sum which should be found to have been received by *Sarah Matson* in respect of *Grant*'s residuary estate, was liable to make good the Plaintiffs' demand; and an account was directed of what had been received by *Sarah Prudence Arrowsmith* in respect of the residuary estate of *Sarah Matson*: and it was declared, that *Thomas Arrowsmith* was liable for the one third of a third of the residuary personal estate of *Thomas Grant*, which had been received by his wife *Alicia Eliza Arrowsmith*; and the remaining two thirds of such third, invested in the name of *Perkins*, were

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declared to be also liable to the Plaintiffs' demand; and an inquiry was directed, whether *Mary Smith* had received any thing, and what, in respect of *Grant*'s residuary personal estate; and it was ordered, that what should appear to have been received by her, should be answered by *Ray* out of her assets. It was also ordered that, out of the funds so declared to be liable, the 1000*l.* Bank Navy 5 per cent. annuities, now reduced to 3½ per cent. annuities, should be replaced. It was referred to the Master to tax the Plaintiffs' costs, and it was ordered that such costs should be paid by *Russell*, and by the other Defendants, out of the funds so declared to be liable; and that, when the stock should have been replaced, any of the parties should be at liberty to apply with respect to the dividends.

All the Defendants, with the exception of *Russell* and *Thomas March* and *Prudence March*, appealed from the whole of this decree, except so far as it affected *Russell*.

Mr. *Barber*, Mr. *Koe*, and Mr. *Loftus Lowndes*, in support of the appeal, said that *Grant*'s assets had been duly administered, so long ago as the year 1823, in ignorance of this claim; and they contended, therefore, that his assets could not be followed. They cited *Harman* v. *Harman* (*a*), *Brooking* v. *Jennings* (*b*), *The Chelsea Water Works Company* v. *Cowper* (*c*), and *Ram on Assets*. (*d*)

They urged that the present Plaintiffs, as well as the Defendants *March* and wife, must be deemed to have had full notice, not only of the breach of trust, but of what was done in the suit of 1818, and to have acquiesced

(*a*) 2 *Shower, K. B.* 492.; 3 *Mod.* 115.

(*b*) 1 *Mod.* 174.

(*c*) 1 *Esp.* 275.

(*d*) Page 673. n. 2d ed.

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quiesced in the abandonment of that suit, and the consequent undisturbed distribution of *Grant*'s assets; for one of the Plaintiffs attained twenty-one in the year 1821, and the other, two years afterwards. They were of age, therefore, when *Grant*'s assets were administered, and an inquiry ought to be directed whether they were not cognizant of that administration. In an unreported case of *Smith* v. *Birch*, Sir *John Leach*, in the year 1831, under circumstances resembling the present, directed an inquiry such as was now asked for. The Plaintiffs did not state in their bill that they were not aware of the abandonment of the former suit, and the distribution of *Grant*'s assets, and did not state when they first became aware of those circumstances; *Harden* v. *Parsons* (*a*), *Andrew* v. *Wrigley* (*b*), and *Shannon* v. *Bradstreet*. (*c*)

Mr. *Wakefield* and Mr. *W. T. S. Daniel*, *contrà*, cited *Bennett* v. *Colley*. (*d*)

Mr. *Barber*, in reply.

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*Aug. 3.*

*The* LORD CHANCELLOR, [after stating the facts of the case, and the substance of the decree:]

The appeal is not by *Russell*, but by the personal representative and legatees of *Grant*; and although the representative of *Grant* joined in the appeal, yet, in the result, the case, as far as *Grant* was concerned, was not pressed in argument. It seemed to be admitted that the decree could not be impugned, so far as *Grant*'s assets were concerned; but, in opposition to the Plaintiffs' right

(*a*) 1 *Eden*, 145.; 3 *Mad.* 63 n.
(*b*) 4 *Bro. C. C.* 125.
(*c*) 1 *Sch. & Lef.* 52.
(*d*) 5 *Sim.* 181.; and 2 *Mylne & Keen*, 225.

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right to call on the legatees of *Grant* to refund, two questions were made: first, that the assets of *Grant*, having been administered in ignorance of this demand, ought not to be followed; and secondly, that the Court ought not to have made the decree which it has made, without a previous inquiry, whether the Plaintiffs knew of, or acquiesced in, the breach of trust, or in the arrangement stated to have been made in the year 1818.

Now, as to the first point, which raises the proposition that assets cannot be followed in the hands of legatees, to whom they have been handed over by the personal representative, in ignorance of the demands of creditors which existed at the time, it is to be observed, that almost all, I may say all, the cases in which legatees have been compelled to refund, have been cases in which the assets have been distributed in ignorance of the claim. It can hardly be supposed that the personal representative would take upon himself the responsibility of handing over the assets to the legatees, if he was aware that any creditors of the deceased were still unpaid. Upon this branch of the argument, several cases were cited which, in my opinion, have no application whatever to the present question. They were cases in which an executor or administrator has been held protected for payments which, though not regular, were payments made in ignorance of the superior claims of other parties. They were cases in which the executor or administrator had honestly and faithfully discharged his duty, to the best of his knowledge; and he was held to be protected. But the question here is, whether the creditor shall not be entitled to follow the assets, which are his fund, (the debts not having been paid,) in the hands of persons who have not purchased them, but to whom they have been delivered in mistake.

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That a creditor may follow assets in the hands of legatees to whom they have been delivered in ignorance of the creditor's demand, has been an established principle of this Court from the earliest period, of the decisions in which we have any traces. In *Hodges* v. *Waddington* (*a*), the rule was laid down; and in *Noel* v. *Robinson* (*b*), it was said to be the constant practice to allow a creditor to compel a legatee to refund. From that period to the decision of Lord *Eldon* in *Gillespie* v. *Alexander* (*c*), there is no instance of any doubt being entertained as to the right of the creditor to follow assets in the hands of a legatee to whom they have been delivered upon the supposition of there being assets to pay that legatee: and what Lord *Eldon* says in *Gillespie* v. *Alexander* is applicable to more than one of the points in this case; for he says, that where a decree has directed an account of debts, a creditor is permitted to prove his debt, as long as there happens to be a residuary fund in Court, or in the hands of the executor; and that if he has not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree; for, if he has a mind to sue the legatees, and bring back the fund, he may do so. Now, that is a case in which the assets have been administered in ignorance of the claim, because they have been administered by the Court, after means have been taken for the purpose of bringing forward all those who have claims upon the fund; but that proceeding shall not protect a legatee from the liability to refund.

Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give security

(*a*) 2 *Ventris*, 360.
(*b*) 1 *Vern.* 90.; and see *S. C.* 2 *Ventris*, 358.
(*c*) 3 *Russ.* 130.

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security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee.

The first proposition, therefore, cannot be maintained in point of law; but is contrary to the established rule of the Court, from the earliest period to which it can be traced.

The second point made by the Appellants is, that there ought to be an inquiry whether the Plaintiffs knew of or acquiesced in the breach of trust, or the arrangement said to have been made in the year 1818.

Now, in order to make it proper to direct that inquiry, it would be necessary to shew that such knowledge and acquiescence would afford a defence, and also that sufficient matters are put in issue by the pleadings to entitle the party to ask for that inquiry. It cannot be meant that the Plaintiffs acquiesced in the breach of trust at the time at which it was committed; because it was committed in or soon after the year 1810, when one of the Plaintiffs was only ten years of age, and the other was only eight. What is meant, therefore, must be, knowledge and acquiescence after the two Plaintiffs attained twenty-one, which, as to one of them, was in the year 1821, and as to the other, in the year 1823.

The knowledge or acquiescence would not be knowledge of or acquiescence in the breach of trust, but it would be knowledge in 1821 of a title to the property, (supposing they became informed of their title then), and abstaining to sue, from that time until the year 1833: but

but it was admitted that, as against *Russell* and the estate of *Grant*, the Plaintiffs were not barred by the time that had elapsed. It was admitted, (and indeed it could not have been disputed) that the time was not such as to prevent the Plaintiffs from instituting this suit against one of the trustees and the representatives of the other. There appears, therefore, to be nothing to prevent them from suing *Grant*'s legatees, unless there have been acquiescence, and knowledge, and concurrence, on the part of the Plaintiffs.

Not only has no knowledge, on the part of the Plaintiffs, of the breach of trust been proved, but there is no allegation in the bill from which their knowledge would appear, nor is any such defence put in issue.

It was said, that in the year 1818 another bill was filed, and that the Plaintiffs may have known of the compromise of that suit.

The only evidence of that is, that one of the witnesses deposes to the fact of a bill having been filed, in which the children were joined as co-plaintiffs, but of the proceedings having been stopped, by *Russell* having offered to give security for the payment of the arrears of interest, and for due payment of the interest for the future. This would be an agreement wholly for the benefit of the tenants for life, and affording no security, indemnity, or remedy to the children, who are the present Plaintiffs. It is not to be supposed that, if they did know of this agreement, many years afterwards, when they came of age, they would acquiesce in an arrangement which gave them no sort of benefit, but on the other hand, would deprive them of their remedy for the recovery of the property; nor are there any allegations, in

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in the pleadings, of their having known of it, or of their having adopted it so as to make it an act of their own.

Then I was referred to the decree made in *Smith* v. *Birch*, which directed an inquiry, whether the Plaintiffs had assented to or acquiesced in the funds remaining in wrong hands, by means of which they were lost: but, without knowing all the circumstances of that case, it is impossible to know whether the facts justified that decree. If any breach of trust had there been committed, by the funds being allowed to be in improper hands, and if the parties to whom the funds belonged chose to acquiesce in that state of circumstances, they could not very well complain of an act to which they were themselves parties. That decree, therefore, affords no ingredient for coming to a conclusion in the present case.

When the Plaintiffs first became informed, either of the breach of trust or of the abandonment of the suit of 1818, does not appear; and whatever may have taken place before the year 1821 is immaterial, inasmuch as, up to that period, they were both under age. There is no allegation with respect to the time at which they became aware of any of the circumstances, except that they came of age in the years already mentioned, and that the bill was not filed until the year 1833. It is not contended that the lapse of time will bar their right to the remedy to which, according to the practice of this Court, they are entitled. I see nothing to interfere with that right so vested in them, and the appeal must therefore be dismissed with costs. (*a*)

Decree affirmed.

(*a*) See *Anon.* 1 *Vern.* 162.; *Anon. Freem.* 134.; *Anon. ib.* 137.; *Chamberlaine* v. *Chamberlaine, ib.* 141.; *Hawkins* v. *Day*, *Ambl.* 160.; *Anon.* 1 *Atk.* 491.; *Hardwick* v. *Mynd*, 1 *Anst.* 109., see p. 112.

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## MOORE *v.* FROWD.

1835.
*Dec.* 18, 19. 21.
1836.
*Jan.* 13.
1837.
*Aug.* 15.

THIS cause was heard before the Lord Chancellor, when Master of the Rolls, and the parties consented to receive his Lordship's judgment after he had become Lord Chancellor.

A trustee, who is a solicitor, is entitled to be repaid such costs, charges, and expenses only as he has properly paid out of pocket; and it makes no difference in this respect, that the instrument creating the trust may have directed that the trust monies should be applied (*inter alia*) in payment of all expenses, disbursements, and charges, to be incurred sustained or borne by the trustee, in professional business, journeys or otherwise; and that the trustee might retain all reasonable costs, charges, and expenses which he might sustain or be put unto; such costs, charges, and expenses to be reckoned, stated, and paid as between attorney and client.

One of the questions discussed at the hearing was, whether four trustees, who were all attorneys and solicitors, were entitled to any costs or charges beyond those which they might have paid out of pocket.

By indentures of lease and release, of the 6th and 7th of *April* 1827, certain property was conveyed, by the Plaintiff (*Charlotte Moore*) and others, to *Edward Frowd*, *Robert Bond*, *William Palmer*, and *William Elkington*, who were all attorneys and solicitors, in fee, upon trust to sell, in lots for building, and to apply the produce of the sale, and the rents and profits to accrue in the mean time, in payment of the costs, charges, and expenses of preparing the indenture of release, and all the expenses, disbursements, and charges, already or thereafter to be incurred or sustained or borne by the trustees, or the trustees or trustee for the time being, either in professional business, journies, or otherwise, for the purpose of negotiating or performing the agreements, trusts, and purposes thereinbefore mentioned or directed to be carried into execution; and also all the costs, charges, and expenses of the persons who had been, or should or might be employed by the trustees for the time being, as surveyors, auctioneers, bailiffs, agents, or servants, in preparing

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preparing and making maps, plans, surveys, estimates, particulars and conditions of sale, roads, bridges, sewers, or other improvements upon the property, or in managing the same, and receiving the rents and profits thereof, or of selling clay and brick earth thereon, or otherwise letting or selling the same premises, or any part thereof; and also all sums of money which the trustees might deem expedient and proper, for the purchase of any estate or interest of any person in the property, to enable them to make a good and marketable title or titles to any purchaser or purchasers; and also of all the expenses of abstracts of title, and copies of deeds and other documents for perfecting the same; and all other the expenses of carrying the trusts, powers, and authorities therein mentioned into execution, and then to make such payments as were therein mentioned.

It was further provided that the trustees should, out of the trust monies, deduct, retain to, and reimburse themselves all such reasonable costs, charges, and expenses as they or any of them should or might sustain, expend, or be put unto, in or about the execution of all or any of the trusts thereby in them reposed; such costs, charges, and expenses to be reckoned, stated, and paid as between attorney and client.

Mr. *Pemberton* and Mr. *Heathfield*, for the Plaintiff, contended that the trustees were only entitled to their costs out of pocket; they cited *Robinson* v. *Pett* (*a*), and *New* v. *Jones*, in the Exchequer, before Lord *Lyndhurst*, on the 9th of *August* 1833. (*b*)

Mr. *Willcock*, for the Defendant *Frowd*, contended, that the trustees were entitled to have their professional charges

(*a*) 3 *P. Wms.* 249.

(*b*) 9 *Bythewood's Conveyancing*, by *Jarman*, p. 338.

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charges allowed; not only because there was no rule to the contrary, but also, because, if there were any such rule, the terms of this deed had taken the case out of the rule. He relied on a case of *Daniel* v. *Goldson*, before the Vice Chancellor, in *March* 1833, in which he said, that a solicitor who was a trustee had been allowed professional charges. He commented also on Lord *Hardwicke*'s observations in *Ayliffe* v. *Murray* (*a*), and cited *Marshall* v. *Holloway*. (*b*)

Mr. *Bickersteth* and Mr. *Wright*, for *Bond*.

Mr. *Tinney* and Mr. *Bird*, for *Palmer*.

Mr. *Bethell*, for the assignee of *Elkington*, who had become bankrupt.

Mr. *Pemberton*, in reply.

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*The* LORD CHANCELLOR, [after disposing of other questions in the cause:]

The next and the most important point is, as to the claim by the Plaintiff, to have disallowed all the Defendants' bills of costs, except money out of pocket.

It appears that the four trustees were all solicitors, and the bill alleges that Mr. *Frowd*'s two bills amounted to 790*l.* 5*s.* 2*d.*, the joint bill of *Elkington* and *Palmer* to 680*l.* 15*s.* 3*d.*, and *Bond*'s bill to 238*l.* 1*s.* 7*d.* — making, altogether, 1709*l.* 2*s.* That all these bills are to be examined and taxed is not disputed; but the question is, whether such taxation is to be a taxation of a solicitor's bill, in the usual course, between solicitor and client, or whether

(*a*) 2 *Atk.* 58. (*b*) 2 *Swanst.* 432.; see p. 452.

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whether the Master is to be directed to allow only costs out of pocket, properly expended.

The first question is, whether the deed of trust disposes of this question; because the parties may, by contract, make a rule for themselves, and agree that a trustee, being a solicitor, shall have some benefit beyond that which, without such contract, the law would have allowed; but, in such a case, the agreement must be distinct, and in its terms explain to the client the effect of the arrangement; and the more particularly, when the solicitor for the client, becoming himself a trustee, has an interest, personal to himself, adverse to that of the client. It is not easy, in such a case, to conceive how, consistently with the established rules respecting contracts between solicitors and their clients, a solicitor could maintain such a contract, made with his client, for his own benefit, the client having no other professional adviser, and in the absence of all evidence, and of any probability, of the client, (a woman, too) having been aware of her rights, or of the rule of law, or of the effect of the contract: but the necessity for following up these considerations does not arise in this case, unless the deed contains a distinct agreement for this purpose.

There are two parts of the deed applicable to this point; first, that part in which the trusts are declared, wherein it is provided that all costs, charges, and expenses of the deed, and all expenses, disbursements, and charges already or hereafter to be *incurred, sustained, or borne* by the trustees, or any of them, either in professional business, journeys or otherwise, for the purpose of negotiating or performing the agreements, trusts, and purposes before mentioned, and all costs, charges, and expenses of persons to be employed by them as surveyors, &c., and all other expenses of carrying the trusts

trusts into execution, shall be paid, in the first place, out of the produce of the intended sales.

Now the costs in question being the ordinary remunerations of a solicitor, as distinguished from the costs out of pocket, cannot be considered as charges and expenses incurred, sustained, or borne by the trustees; but such expressions in terms apply to payments made or liabilities incurred.

The next provision is more specific; it provides that each trustee is to be at liberty to retain and reimburse himself all such reasonable costs, charges, and expenses as he may *sustain or be put unto*, such costs, charges, and expenses to be reckoned, stated, and paid as between attorney and client; but this provision does no more than the rule of law would have done, a trustee's costs being taxed as between attorney and client. And what are the costs so to be taxed? Costs which the trustee may sustain or be put unto; terms wholly inapplicable to sums claimed as remuneration.

There is nothing in either of these provisions which is peculiarly applicable to the case of the solicitor being also trustee. It cannot, therefore, be assumed that the intention was to provide for some other mode of dealing with that union of characters, than what the law would have enforced; and still less that, under such provision, a solicitor dealing with his client can be permitted to claim that which, without, at least, a specific contract with the client, and proof that the client was fully cognizant of her legal rights independently of such contract, and of the effect and legal consequences of the act upon such legal rights, he would not be entitled to claim.

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It remains, therefore, to be seen what is the rule of law in cases in which no specific contract regulates the rights of the parties. It is clear that if an attorney be allowed to make profit, by means of professional business, of his office of trustee, it will constitute an exception to a rule well known and established in all other cases; *Robinson* v. *Pett.* (*a*) A factor acting as executor is not so entitled; *Scattergood* v. *Harrison* (*b*): nor a commission agent; *Sheriff* v. *Axe.* (*c*) Why is the case of a solicitor to constitute an exception to the rule? What is the reason given for the rule? It is, I think, well stated in *Robinson* v. *Pett*, "The reason seems to to be, for that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value." It is not because the trust estate is in any particular case charged with more than it might otherwise have to bear; but that the principle, if allowed, would lead to such consequences in general. In the case of the factor or agent, if the executors had employed other persons in those capacities, they would probably have been allowed the expenses; but if they are to perform those duties themselves, and to charge a profit upon such employments, what protection can the Plaintiff have against extravagant charges? Do not these reasons apply to the case of solicitors? Does not this very case strongly exemplify the danger, and illustrate the merit of the rule which would avert it? If, therefore, it had been necessary for me to come to a conclusion upon this point, without the aid of previous decisions directly applicable, I should not have felt much difficulty in the performance of that duty; but still, I am glad to be relieved from that necessity, and to find my own opinion confirmed by that of Lord *Lyndhurst*, in the case of *New*

(*a*) 3 *P. Wms.* 249.
(*b*) *Moseley*, 128.
(*c*) 4 *Russell*, 33.

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*New* v. *Jones* (*a*), in which that question was deliberately considered, and decided conformably to the opinion I have expressed.

It was, indeed, said, that a contrary decision had taken place in the case of *Daniel* v. *Goldson*; but I do not find that the point was there raised or decided. The Master, indeed, may have allowed such costs; but I do not find any judgment of the Court upon it.

In Lord *Lyndhurst*'s judgment I entirely concur, and must, therefore, in this case, direct, that, in taking the accounts against the trustees, they should be allowed only the costs out of pocket.

The Master, in taking the accounts of the trustees, is not to allow to them any professional charges, or charges for loss of time, or other emoluments, but to allow only such charges and expenses actually paid by them out of pocket as he shall find to have been properly incurred and paid by them.

(*a*) 9 *Bythewood's Conveyancing by Jarman*, p. 338.

## MALCOLM *v.* O'CALLAGHAN.

1836. *Nov.* .
1837. *Nov.* 15.

A receiver is not entitled to be reimbursed the expenses of journeys to, and residence in a foreign country, for the purpose of prosecuting proceedings for the recovery of property belonging to the estate, before the tribunals of that country, unless he has the express sanction and authority of the Court for such journeys and residence.

Principles and practice of the Court with respect to allowances made to receivers for extraordinary services.

THIS was an appeal-petition, presented by some of the parties in the cause, against an order of the Vice-Chancellor, directing that the Master should review his report, with reference to certain sums which had been claimed by the receiver in the cause, and which the report had disallowed. The appeal-petition prayed that the order of the Vice-Chancellor might be discharged, and the Master's report confirmed.

The circumstances and transactions out of which the receiver's claim arose, and the various orders and other proceedings upon which the argument principally turned, are stated in the judgment.

Mr. *Wigram* and Mr. *Wray*, in support of the petition.

Mr. *Wakefield* and Mr. *Toller*, for the receiver.

In the course of the argument, the following cases were cited, with reference to the expenses of journeys and other proceedings undertaken by agents on behalf of their employers; — *In the matter of Ormsly* (*a*), *Crossley* v. *Parker* (*b*), *Alsop* v. *Lord Oxford* (*c*), and *In re Montgomery*. (*d*)

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*The*

(*a*) 1 *Ba. & Be.* 189.
(*b*) 1 *J. & W.* 460.
(*c*) 1 *M. & K.* 564.
(*d*) 1 *Molloy*, 419. See also *Horlock* v. *Smith*, 2 *Mylne & Craig*, p. 523.

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In this case, the Master having disallowed the receiver's demands for the expenses of four out of nine journeys to *Paris*, alleged to have been properly undertaken in prosecuting a claim on behalf of the testator's estate, the Vice-Chancellor, by an order of the 11th of *November* 1835, made upon a petition of the receiver, excepting to the Master's report on account of such disallowance, ordered a reference back to the Master to review his report as to the four journeys in question, with liberty to receive new evidence thereon.

This order contains no adjudication upon the question, but it does assume that the Master's report is not satisfactory as it stands; and two questions might present themselves for my consideration; first, whether I am satisfied, upon the case as it appears from the report, that the Master came to a right conclusion; and, secondly, if not, whether the Court had before it the necessary materials for adjudicating upon the question, because, the decision of the Master being against the claim, the claimant cannot well be heard to say that he did not bring the whole of his case before the Master. My opinion upon the first point, however, will render it unnecessary to consider the second.

Upon the first point, the terms, spirit, and intention of the order upon which the report was founded must be minutely considered.

It appears that, the debts and legacies of the testator in the cause having been paid, the property in question is, under his will, to be divided equally among eight residuary legatees.

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The order, in pursuance of which the report is made, is dated the 24th of *May* 1831, and was pronounced by the then Lord Chancellor. By that order it was referred to the Master, to inquire and state whether the several journeys to *Paris*, undertaken by the receiver as therein mentioned, were, under the circumstances, and with reference to the orders, properly undertaken and made; and whether the expenditure incurred by him in and about the said journeys and proceedings, and charged in the receiver's accounts, were necessary and proper; and, after providing for the receiver's costs and expenses of the proceedings in the *French* Courts against *Daniel Parker*, it was, by that order, referred to the Master to inquire and state whether the receiver was entitled to any, and, if to any, what remuneration, under the circumstances of the case, for his time, trouble, and services, and the discharge of his duty in collecting and receiving, or endeavouring to collect and receive, or recover the outstanding personal estate of the testator, or otherwise in the performance of the duty imposed upon him by the Master's report of the 4th of *September* 1816, and the order confirming the same, and the other orders therein mentioned.

It appears that the receiver was appointed in the year 1816, in the usual manner, upon the application of five of the residuary legatees. The first order containing any special authority to the receiver, respecting the claim which gave rise to the expenditure in question, is dated the 23d of *January* 1818. It was thereby ordered that the receiver should be at liberty to call in and sue, either civilly or criminally, for the monies due to the testator's estate from *Daniel Parker*, then residing in *France*, and that he should indemnify the executors. By the second order, which is dated the 22d of *May* 1819, it was referred to the Master to inquire whether a sum

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a sum of 500*l.* should be allowed to the receiver out of the fund in Court, on account of the costs, charges, and expenses thereafter to be incurred by him in proceeding to and residing at *Paris* for the purpose of completing the proceedings, and in prosecuting the suit, against *Parker*; but that inquiry was to be without prejudice to any question as to the necessity or expediency of the expenses incurred by the receiver, or as to his claim thereafter to be reimbursed any further sum on account of his said costs, charges, and expenses, or to a remuneration for his trouble and sacrifice of time in proceeding to and residing at *Paris*, and prosecuting the said suit.

The Master having reported in favour of the advance of the sum of 500*l.*, and having stated, upon the authority of the receiver, that if the sums claimed should be recovered in the *French* Court, it would be necessary to pay 2½ per cent. into the Court there, it was, by an order of the 7th of *August* 1819, ordered that the sum of 500*l.* should be paid to the receiver for the purpose of enabling him to proceed to *Paris* to complete the prosecution of the suit against *Parker*, and to pay 2½ per cent. on the amount recovered into the Court there; but such payment was to be without prejudice to any question as to the necessity or expediency of the expenditure incurred by the receiver in the several journeys and matters in the petition mentioned, and also without prejudice to the claim, if any, which he might have, according to the regulations of this Court, or otherwise, to any reimbursement or remuneration beyond and exceeding the said sum of 500*l.*

The Master has, by his report, dated the 15th of *July* 1835, allowed to the receiver the expenses of his first, second, fourth, fifth, and sixth journeys to *Paris*, and compensation for his services during his absence

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upon such journeys, at the rate of one guinea per day, amounting, for the journeys allowed, to 584*l.*, and also the whole expenses of the proceedings against *Parker*, amounting to about 1850*l.* The claim disallowed by the Master, that is, the expenses and remuneration in respect of the third, seventh, eighth, and ninth journeys, amount to 1927*l.* 14*s.*

In support of the claim of the receiver, much reliance seems to have been placed upon several contracts or undertakings in writing, entered into by different parties interested in the residue, and under which he states that he acted in undertaking these several journeys. I do not consider these contracts or undertakings as properly applicable to the question before me. None of them are entered into by all the parties interested in the residue; and, if they had been, the order upon which the report proceeds does not refer to them. The parties signing these authorities may or may not have rendered themselves personally liable; but the question I have to consider is, whether the receiver is entitled, by the authority of the Court administering the estate, to be paid, out of the estate, that part of his demand which has been disallowed, either under the circumstances of the case, or under the orders referred to.

I will, in the first place, consider the orders. The first of these, namely, the order of the 23d of *January* 1818, certainly entitles the receiver to all proper costs of the proceedings against *Daniel Parker*. But it does no more; and as all those costs have been allowed, that order will have no application to the present question, unless it shall appear that the claims in question necessarily and properly arose in the execution of that order.

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The order of the 22d of *May* 1819, directing the reference as to the 500*l.*, is superseded by the order of the 7th of *August* 1819, directing the payment of that sum: but the two orders do not materially differ, except in so far as the latter authorizes the payment of the 500*l.* not only to defray the expenses of the receiver in proceeding to *Paris* to complete the prosecution of the suit against *Parker*, but also to enable him to pay the 2½ per cent. upon the sum recovered, which percentage he had informed the Master would be payable, but which it appears was not paid. The Master having allowed far more than this 500*l.* for the receiver's expenses, no question arises as to this sum, or as to the expediency of its expenditure. The order, in the most express terms, guards against any inference which might be drawn from such advance in favour of any other charge on account of journeys, or for remuneration or reimbursement beyond it.

It seems to have been supposed, though this order did not in terms authorize any other journey to *Paris* than that which was then contemplated, or any expenditure beyond the 500*l.*, yet that, by expressly authorizing so much, it gave a degree of sanction to the other journeys, and to the further expenditure, which ought to be taken into consideration upon the question of the receiver's claim for the other journeys, and for the further expenditure. To this I cannot assent. In the terms of the order, and of the reservation in it, there is no ambiguity. The Court cautions the party against any such inference as that now contended for; and it would, I think, be injurious to the practice of the Court, and to the interests of the suitors, if such orders were to have consequences attached to them beyond what the terms warrant.

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It remains, therefore, to be considered, whether the journeys disallowed by the Master were, in the language of the order of the 24th of *May* 1831, "under the circumstances, properly undertaken and made, and whether the expenditure incurred in and about the said journeys and proceedings were necessary and proper."

In considering this matter, the first question will be, what are the ordinary duties of a receiver authorized to sue for a particular part of the estate supposed to be outstanding, when he exercises his own discretion without any other specific authority or direction from the Court. It has not, and cannot be contended that his ordinary duty would justify him in incurring the expenses of journeys to, and of residence in, a foreign country, whilst prosecuting in that country a suit which he had been authorized to commence. If there had been any doubt upon this subject, according to the general practice of the Court, the orders of the 22d of *May*, and of the 7th of *August* 1819, would have been conclusive in this case, that the order of the 23d of *January* 1818 was not considered as authorizing such expenditure. A country solicitor is not, in general, allowed his costs of attending a suit in *London*, although his client may have requested him so to do. If, indeed, success had attended the exertions of the receiver, and he could have shewn that such success had arisen from his presence in *Paris*, it might have been thought inequitable for the parties to take the benefit of such exertions without defraying the expenses which had attended them, although no previous authority for incurring them had been given. But the present is the case of an unauthorized and unprofitable expenditure. In the case of *in re Montgomery* (*a*), which was cited in the course

(*a*) 1 *Molloy*, 419.

course of the argument, the receiver of a lunatic's estate instituted proceedings which, being wrong in form, he abandoned, and having afterwards taken other proper proceedings, he was successful for the estate. The Court there refused to allow him the costs of the abandoned proceedings, although the Master reported that the receiver acted *bonâ fide*, and ought to be allowed the costs. It is not easy to conceive a case in which such a claim, not founded upon the general practice of the Court, or upon any special order, and not sanctioned by success, could be maintained against the estate; yet such is the present case.

Supposing, however, such a case to be possible, would the special circumstances of the journeys, the expenses of which have been disallowed, support the claim? If it be supposed that the expenses which have been allowed, furnish an instance contrary to the rules and principles to which I have adverted, it must be remembered that no objection has been made to those allowances, and that the judgment of the Court has not been asked upon them; and, on the other hand, I wish it to be understood that in considering the particular circumstances of these journeys, I am not assuming that my opinion of the validity of the claim disallowed is founded upon my view of such special circumstances, but I do so, for the purpose of explaining to the parties that, in my opinion, the Master came to a right conclusion, even upon this view of the case.

The dates of the journeys disallowed are material. The third journey commenced on the 9th of *June* 1818, and the residence at *Paris* continued till the 20th of *March* 1819, being 285 days. The seventh began on the 26th of *September* 1821, and the residence at *Paris* continued till the 5th of *May* 1822, being 222 days. The

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The eighth began on the 6th of *September* 1822, and the absence continued till the 4th of *June* 1823, being 272 days. The ninth began on the 19th of *March* 1824, and the absence lasted till the 30th of *August* 1824, being 165 days. The total time charged for, during these several residences abroad, being 944 days, and the expenses and remuneration claimed being 1927*l.* 14*s.*, from which no benefit whatever has resulted to the estate.

The third journey was taken, and the whole of the foreign residence arising out of it, took place before the order of *May* 1819 was made, and all the proceedings in the *French* Court during that period related to the question of jurisdiction. There was no question of fact, and no matter of evidence to be attended to. The receiver's journey and foreign residence, therefore, must have been wholly useless.

When the receiver commenced the seventh journey, in *September* 1821, he had obtained a decree of the *Tribunal de Commerce;* and he says that he went to prepare for the appeal, which, as he states himself, he was told could not be heard before *November*, and which was not in fact heard till *April* following. Now, if the receiver's presence had been necessary for the hearing of the appeal, his going to *Paris* in *September* 1821, to prepare for the hearing of an appeal which was not heard until *April* 1822, and his residence there during all the intermediate time, must have been wholly useless. Neither could his presence have been necessary upon the discussion of a matter of law on an appeal. I think, therefore, that there is nothing in the facts to shew the propriety of this expenditure, or the justice of the receiver's claim on account of this journey.

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His return to *England* in *May*, and his eighth journey to *Paris*, in *September* 1822, are stated to have been solely for the purpose of obtaining and submitting to the *French* Court the opinions of the Attorney-General and Solicitor-General, an object which would not have justified a country attorney's journey to *London*, and cannot possibly justify the journey of the receiver. It having been adjudged upon appeal to the *Cour Royale* that the case should be remitted back to the *Tribunal de Commerce*, with directions that it was to be decided according to the *English* law, and that the opinions of *English* lawyers were to be received, and the receiver having accordingly been provided with the opinions of the *English* Attorney-General and Solicitor-General, it seems obvious that his personal attendance on the hearing would be useless. But how can his residence at *Paris* from *September* 1822, when he took his eighth journey, till *March* 1823, when the cause was heard and finally decided by the *Tribunal de Commerce*, be justified?

The decree of the foreign tribunal having denied to him the power of arresting *Parker*, he says he came to *England* to consult the family, whether he should appeal; and that having received from them authority for so doing he took his ninth journey. Now this may be a strong ground of claim against the individual members of the family, who gave him that authority, but it furnishes no ground for the Court allowing the expenses of this journey out of the estate. He did not come to ask the opinion of the Court; and the Court, upon the present inquiry, has nothing to do with the opinion of the individual members of the family. The expense of this journey, therefore, cannot be considered by the Court as properly incurred.

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The ninth journey was taken for the purpose of appealing to the *Cour Royale* against this refusal of the power of arresting *Parker*. The receiver commenced it in *March* 1824, for the purpose, as he says, of prosecuting the appeal, which did not come on to be heard until the 17th of *July*, when the decree of the *Tribunal de Commerce* upon this point was affirmed. For what purpose beneficial to the parties was he residing in *Paris* from *March* till *July* 1824, and of what use would his presence be at the hearing of an appeal upon a point of pure *French* law? The appeal turned out to be useless; and, had it been otherwise, the receiver's presence could not have been necessary. But besides all this, in *May* 1821, the receiver was informed that *Parker* had sold off all his property, so that unless he could have the power of arrest, there seemed to be no prospect of fruit from the most successful litigation; and yet he not only continued the litigation without any authority from the Court, but now desires to be paid out of the estate large sums of money on account of his own unnecessary journeys and expenses, and remuneration for unprofitable and, as far as the Court is concerned, unrequired services.

I am, therefore, of opinion that the Master came to a correct conclusion, upon the grounds which he took; and that, supposing the receiver had only to make out that his journeys to *Paris* and his residence there were proper, regard being had to the proceedings in progress there, he has wholly failed in making out such a case.

I have abstained from making any observations upon the written authorities or indemnities signed by several of the parties, set forth in the receiver's petition, because I do not consider that the question before me is at all affected by these individual undertakings. They are

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are not referred to in the order, and they cannot constitute any claim against the estate at large, to which the inquiry is confined. They do, however, furnish ground for believing that the receiver, when he undertook these journeys, did not look to the estate or to the Court, but was then contented with the personal undertakings of some of the parties interested in the residue. Whether any remedy be open to him upon those personal undertakings, forms no part of the subject of my present consideration. I consider the claim as made against the estate; and, as such, the undertaking of the individuals ought not, I think, to be permitted to affect the decision.

I am, upon the whole, therefore, of opinion that the receiver's petition, excepting to the Master's report, ought to have been dismissed with costs; and that upon the petition of the parties in the cause, the usual order ought to have been made, confirming the report.

## TASKER *v.* SMALL.

*Jan.* 17, 18.
*Nov.* 18.

THIS case is reported, upon the argument of the demurrer, and at the hearing, in the sixth volume of Mr. *Simons's Reports* (*a*), where the nature and objects of the suit, and the different instruments and transactions out of which the question arose, are particularly stated. The

When a bill for specific performance is filed by a person who has contracted to purchase the absolute legal, and equitable interest in a mortgaged estate from the supposed owner of the equity of redemption, neither the mortgagee nor a person who claims an interest in the equity of redemption, but has not joined in the contract, can be made a Defendant; and the circumstance, that the mortgagee does not object to being made a party, but requires the sanction of the person so claiming an interest in the equity of redemption before joining in the conveyance, does not make that person a proper party.

(*a*) Page 625.

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The Defendant, Mrs. *Small*, by her next friend, presented a petition of rehearing; and submitted, first, that the Vice-Chancellor's decree was erroneous upon the merits; and, secondly, that the record was wrong in point of form, and that she ought not to have been made a party to the suit. The arguments urged by the Respondents on the second point are stated and considered in the judgment, in which the material facts of the case are also shortly recapitulated.

Mr. *Knight* and Mr. *Spence*, for the purchaser, in support of the decree.

Mr. *Cooper*, for the Defendants *Baker* and *Mann*.

Mr. *Jacob* and Mr. *Willcock*, for the appeal.

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*Nov.* 18.

*The* LORD CHANCELLOR.

The bill in this case is filed by a purchaser, for the specific performance of a contract made and signed by himself, on the one part, and by the Defendants, *Benjamin Russell Baker*, *Thomas Mann*, and *Arthur George Small*, on the other part. But there is in it this peculiarity; — it prays it may be declared that a good title can be made to the estate in question, except as to the life estate of a Mrs. *Lucas*; and this seems to be the real object of the suit. In order to obtain a decision upon this subject, there are made Defendants certain mortgagees, who are not parties to the contract, Mrs. *Small*, the wife of the party by whom the contract for the sale was made, and who is the party appealing from the decree, and Mr. *Ashford*, who was named as a trustee in articles executed in contemplation of her marriage.

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The facts of the case, as stated in the bill, are shortly these:—Mr. *Small*, previously to his marriage, was entitled to the estate in question, in tail male, subject to the life estate of Mrs. *Lucas;* and by his marriage articles, dated the 3d of *December* 1830, his intended wife, the present Appellant, Mrs. *Small*, being then an infant, he contracted with her uncle, Mr. *Ashford*, that subject to the life estate of Mrs. *Lucas*, and to the raising, by mortgage or otherwise, of any sum or sums of money, not exceeding in the whole 15,000*l.*, by himself, the estate should be conveyed and assured upon the trusts of a settlement; and for that purpose he covenanted that, as soon as conveniently might be after the marriage, subject and without prejudice to the raising by any ways or means, and at any time or times he should think proper, of any sum or sums of money, not exceeding in the whole 15,000*l.*, by mortgage, annuity, or otherwise, for his own use and benefit, and to any deed or deeds and assurances which he might thereafter make or execute for securing the repayment of such sum or sums of money and the interest thereof, he would make and execute all necessary and proper acts and deeds for the purpose of settling the estate to the use of Mr. *Ashford*, during the life of the wife, in trust to pay the rents to her, for her separate use, with remainder to himself for life, remainder amongst the children of the marriage, remainder to the survivor of the husband and wife, with various powers of management and application of the rents for the benefit of the children—all applicable to the real estate—and a provision that there should be inserted in the settlement all such powers, provisoes, covenants, clauses, and agreements as might be considered essential for the parties interested therein, or as might be proper for effecting the several purposes, and as were usually contained in settlements of the like kind.

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By indentures of the 2d and 3d of *March* 1831, Mr. *Small*, having borrowed 5000*l.* of *Thomas Phillips*, conveyed the estate comprised in the articles to *Phillips*, subject to the usual proviso for redemption, and covenanted to levy a fine for that purpose. *Phillips* had a power of sale given to him by the mortgage deed, and it contained an assignment of a policy of insurance for 5000*l.* upon the life of Mrs. *Lucas*.

A fine was accordingly levied in *Easter* term 1831.

By indentures of the 26th and 27th of *October* 1832, Mr. *Small*, having borrowed another sum of 5000*l.* of the Defendant *Wakeford*, secured the repayment of it in a similar manner; but for this loan the Defendants, *Benjamin R. Baker* and *Thomas Mann*, joined as sureties in the covenant for payment.

By indentures of the 28th and 29th of *October* 1832, to which Mr. *Small* and Mr. *Ashford*, *Phillips* and *Wakeford*, two of the mortgagees, and *Benjamin R. Baker* and *Thomas Mann* were expressed to be parties, Mr. *Small* conveyed the estate to *Baker* and *Mann*, subject to the life estate of Mrs. *Lucas*, and subject also to the mortgages, upon trust, if *Small* made default in paying the interest upon the mortgages or the premiums upon the policies, to sell the estate, at their discretion, and to apply the proceeds in reimbursing themselves, repaying the premiums paid, paying the mortgage debts due to *Phillips* and *Wakeford*, and to pay the surplus to Mr. *Small*, or to the persons entitled thereto under the articles of the 3d of *December* 1830.

Mr. *Small* subsequently raised two other sums, one of 2500*l.* by mortgage to the Defendant *Hawkins*, and the other of 1000*l.*, by sale of an annuity now vested in the Defendant

Defendant *Sarah Baker*; so that of the whole 15,000*l.* the sum of 1500*l.* only remained to be raised.

The Defendants, *Baker* and *Mann*, are the vendors under the deed of the 29th of *October* 1832; and they, by an agreement, dated the 21st of *December* 1833, (to which they were parties of the first part, Mr. *Small*, of the second part, and the Plaintiff, of the third part,) agreed, in consideration of 19,250*l.*, to sell the fee-simple of the estate to the Plaintiff, expectant upon the death of Mrs. *Lucas*, so far as such estate had been acquired under the fine, or as *Small* could acquire it during her life with her concurrence. It appears that, by deeds executed in pursuance of the statute (*a*), Mr. and Mrs. *Lucas* having consented, the effect of a recovery was obtained, and the legal estate vested in *Phillips* the mortgagee. There is no allegation in the bill respecting Mrs. *Small*'s interest, except in the statement of the marriage articles.

To this bill Mr. *Ashford* and Mrs. *Small* put in a general demurrer, upon the discussion of which, or at the hearing, two questions were made; first, whether the marriage articles authorised Mr. *Small* to sell the estate to raise the 15,000*l.*, and, if so, whether, under the circumstances, such power was duly exercised; and, secondly, whether Mrs. *Small* was a proper party to the suit.

From the report of the case in the Court below upon the demurrer (*b*), it appears that the counsel for Mrs. *Small*, being desirous of obtaining a decision upon the other points, waived the objection of Mrs. *Small* being a party to the suit, and the Vice-Chancellor, being of opinion

(*a*) 3 & 4 *W.* 4. *c.* 74. (*b*) 6 *Sim.* 625.

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opinion that the articles authorised the sale, over-ruled the demurrer; but his Honor expressed some doubt whether Mrs. *Small* ought to have been made a party to the suit. Upon the argument at the hearing, reported in the same book, both points were again raised; but his Honor made a decree declaring that *Small* was entitled to sell the fee-simple and inheritance in remainder of the whole estate, for the purpose of raising 15,000*l.*, and referred it to the Master to inquire whether that sum, or any and what part thereof, had been raised, and whether the contract of the 21st of *December* 1833, was, at the time, a fit and proper contract.

The decree adjudicates nothing as to the propriety of the contract, and cannot, therefore, be objected to, if the declaration be correct, that, under the articles, *Small* was entitled to sell the fee-simple in remainder of the whole estate, for the purpose of raising the 15,000*l.*; all questions as to the manner in which that power was exercised being reserved: but I understand the declaration to decide, that such power existed from the moment of the execution of the articles.

The second question is to be considered first, because if Mrs. *Small* be not a proper party to the suit, it would not only be unnecessary, but improper, to give an opinion as to any point in the cause.

It is not disputed, that, generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of courts of equity in suits of that kind is considered, it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a court of law, giving damages only for the non-performance of the contract, in many ca

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cases does not afford an adequate remedy. But, in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it. And so is the admitted practice of the Court; but it is said that this case ought to be an exception to the rule, because *Phillips*, in whom, as first mortgagee, the legal estate is vested, is not willing to convey it to the Plaintiff, the purchaser, without having competent authority for so doing, and that, the question being raised whether the legal estate can be so conveyed, Mrs. *Small* is of necessity made a party to the suit.

This proposition assumes two points; first, that *Phillips* is himself a proper party to the suit; and, secondly, that, being so, it is competent for him to require that Mrs. *Small* should be made a party to it.

*Phillips* is merely a mortgagee, against whom no bill can properly be filed, except for the purpose of redeeming his mortgage, and that by a party entitled to redeem. This bill does not pray any redemption of *Phillips*'s mortgage, and, if it had, the Plaintiff would not be entitled to file such a bill. He is only connected with the property by having contracted to purchase the equity of redemption, and until that purchase is completed he cannot redeem the mortgage. *Phillips* has no interest in the specific performance of the contract; he is no party to it; and the performance of it cannot affect his security

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or interfere with his remedies. Supposing, however, that it was competent for the Plaintiff to redeem *Phillips*'s mortgage, he can only be so entitled as standing in the place of the mortgagor; but a mortgagee can never refuse to restore to his mortgagor, or those who claim under him, upon repayment of what is due upon the mortgage, the estate which became vested in him as mortgagee. To him it is immaterial, upon repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it, any more than a tenant is at liberty to dispute his landlord's title. *Phillips*, therefore, is bound, upon payment, to restore the legal estate to his mortgagor or to those who claim under him. By *Phillips*'s mortgage deed the equity of redemption was reserved to *Small*. If the Plaintiff could shew such equity of redemption to be vested in him, he would be entitled, upon paying the mortgage debt, to demand a re-conveyance of the estate, without regard to any other question affecting the title to the property.

I am, therefore, of opinion that *Phillips* himself is not a proper party to this suit, and that he cannot, by not himself insisting upon the objection, make Mrs. *Small* a proper party; and that, even if he were himself properly made a Defendant, the objection raised by him at the bar, though not by his answer — for by his answer he offers to re-convey upon being paid his mortgage debt — would not make Mrs. *Small* a proper party.

But it was argued at the bar that the Plaintiff was, in equity, invested with all the rights of Mrs. *Small*, upon the principle that, by a contract of purchase, the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable

equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property.

In *Mole* v. *Smith* (*a*), Lord *Eldon* says, that when a bill is filed for a specific performance, it should not be mixed up with a prayer for relief against other persons claiming an interest in the estate. Such was his opinion in a case in which the vendor was plaintiff, and the defendants were persons whom the vendor sought to compel to join in completing the title. How much stronger is the objection where the purchaser is the Plaintiff, and the only connection between him and the Defendants is the incomplete disputed contract.

I am, therefore, of opinion that Mrs. *Small* is not a proper party to this suit; and that the bill ought to have been dismissed with costs as against her.

It is to be regretted that this opinion will prevent the parties from having the question between them so effectively decided as it might otherwise have been; but I cannot, to avoid an inconvenience in a particular case, sanction a proceeding which I consider to be inconsistent with the rules of pleading, and which, if recognised, might lead to much difficulty and confusion in the proceedings of the Court.

(*a*) *Jac.* 490.; see p. 494.

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*Jan.* 25, 26, 27.
*Nov.* 17.

## MILLIGAN *v.* MITCHELL.

Upon a bill filed by two persons, pew-holders in a chapel, and members of the congregation, and, in virtue of certain offices which they held, entitled to be trustees of the chapel, on behalf of themselves, and all other persons interested as such pew-holders and members, except the Defendants, against the other persons entitled to be such trustees, and against the person in whom the legal interest in the lease was vested, alleging that the lease of the chapel was held upon an exclusive trust for religious service according to the doctrines and discipline of the Church of *Scotland*, charging the Defendants with introducing preachers into the pulpit who were not ministers of the Church of *Scotland*, and with other acts in violation of the trust, and praying that the Defendants might be compelled to perform the trust, the Court granted the relief prayed; holding, first, that, upon the evidence in the cause, the alleged trust was sufficiently made out; secondly, that the acts complained of amounted to a breach of trust; and, thirdly, that the record was properly framed with a view to the object of the suit.

An amendment making the Plaintiffs in the original bill sue on behalf of themselves and all other persons having the same interest, does not so alter the parties or the frame of the record that depositions taken in the original suit cannot be used in the amended suit.

THE substance of the bill, and the general objects of the suit, are stated in the report of this case, upon the motion for an injunction before Lord Chancellor *Brougham*. (*a*)

When the cause subsequently came on for hearing at the Rolls, a preliminary objection for want of parties was taken and allowed; and the bill stood over, with liberty to amend. (*b*) The record having been eventually amended, in the manner stated in 1 *Mylne & Craig*, 511., the cause was again brought to a hearing.

Mr. *Daniell*, for the Defendants, objected to the reading of the depositions, on the ground that the whole of them had been taken in the original cause, before the bill was amended, and not in the cause which was now before the Court for hearing. By the effect of the amendments, the frame of the record had been totally altered. Substantially, the suit was between entirely new parties; and it would be unjust to allow the evidence to be used against persons who were not parties at

(*a*) 1 *M. & K.* 446. (*b*) See 1 *M. & C.* 454.

t the time when it was taken. Besides, the record had been so essentially varied by the amendments that no indictment for perjury could be sustained upon the depositions.

*The* LORD CHANCELLOR over-ruled the objection, observing that it was only on the supposition that all the parties represented by the Plaintiffs had a common interest that the bill could be sustained at all; and that, with regard to the indictment for perjury, he did not apprehend that any difficulty could arise on that ground.

The Plaintiffs' evidence was then read.

Among other evidence in support of the Plaintiffs' case, an extract was read from the minute book of what was called the kirk-session of the congregation, purporting to be resolutions unanimously adopted at a meeting of the congregation held on the 29th of *March* 1803, "for the purpose of enacting certain laws and regulations for preventing feuds and controversies, and preserving order and unanimity in the *Scotch* Presbyterian church, or kirk, at *Woolwich*." Of these laws and regulations, the following were the most material articles: — 1st. "That no minister receive a call, nor be appointed pastor of this congregation, who hath not been licensed to preach the Gospel, according to the regulations observed in the Established Church of *Scotland*. 2d. That no person have a vote in this congregation who hath not paid at least six months towards the support of this church, and not in arrears for pew rent: but no person taking a seat while the church is vacant of a minister to be allowed to vote until after a minister is appointed. 3d. That the spiritual concerns of the church be entirely under the cognisance

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nisance of the minister and elders; and that the gentlemen in trust for the donation of the late Mrs. *Elizabeth Drake*, with the elders of this church, be a committee to assess the pews, to raise a salary to the minister. 9th. Should any proposal be made for a new law, or the alteration of an old one, the committee, after consideration, shall cause the same to be read to a meeting of the congregation, when three months must elapse before the same is voted; and it is hereby declared that no law or alteration of an old one take effect, unless two thirds of the congregation then present be for the same, which meeting shall have been previously summoned for the purpose."

On behalf of the Defendants, the following resolution, dated the 4th of *November* 1833, and recorded in the minute-book, was read as an exhibit: — "The congregation having met, on or about the 24th of *July* 1833, by notice duly given from the pulpit, to take into consideration the propriety of annulling the by-laws framed on or about the 29th of *March* 1803, on which day, viz. the 24th of *July* 1833, a motion was submitted that the aforesaid by-laws should be repealed and disannulled, the congregation, now duly assembled this 4th of *November* 1833, do hereby resolve the aforesaid by-laws to be repealed and disannulled; thereby leaving the church in the position in which it stood before the said by-laws were framed."

The general effect of the evidence sufficiently appears in the report of the argument and in the judgment.

Mr. *Wigram* and Mr. *James Russell*, for the Plaintiffs, submitted that by the deed under which the chapel was erected, and by the contemporaneous proceedings of the congregation, the building was distinctly and exclusively dedicated

dedicated as a place of worship for Presbyterians who conformed to the discipline and doctrines of the National Church of *Scotland*; and that the Defendants had no right or authority, under the ninth article of the by-laws, or otherwise, to alter its original constitution in the manner they had attempted to do by the resolution of the 4th of *November* 1833. Under these circumstances, the jurisdiction of the Court to interfere, for the purpose of restraining the Defendants from violating the trusts to which the chapel had been solemnly devoted, was quite of course; *Foley* v. *Wontner* (*a*), *Leslie* v. *Birnie*. (*b*) As an authority for the form of the suit they referred to *Weld* v. *Bonham*. (*c*)

Mr. *Agar*, Mr. *Daniell*, and Mr. *Chandless*, for the Defendants, contended that the Plaintiffs' evidence had entirely failed in establishing an exclusive dedication of the lease and chapel to a trust for religious worship according to the doctrines and discipline of the National Church of *Scotland*. Down to the period of Dr. *Blythe*'s appointment as minister, the congregation had been a mixed body, comprising various classes of presbyterian dissenters. Mrs. *Drake*, who by her will, dated in 1730, gave 30*l*. a year to the minister, was of the sect of *English* Presbyterians, a sect entirely unconnected with the Church of *Scotland*, which at that time, indeed, had not any body of dissenters in the South of *England* in communion with it, or acknowledging its supremacy: and it was proved by the entries in the records of the protestant dissenting ministers of the three denominations, kept at *Redcross Street*, that the chapel which had been formerly used by this very *Woolwich* congregation as their place of worship, and in lieu of which the present chapel

(*a*) 2 *J. & W.* 245.
(*b*) 2 *Russ.* 114.
(*c*) 2 *Sim. & Stu.* 91.

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chapel was built when the other had fallen into decay, was one of the old non-conformist chapels, known by the general name of presbyterian. Even during the ministry of Dr. *Blythe*, the proceedings of the congregation in several points, and particularly in the mode of electing elders, and in the form of worship, deviated from the standard prescribed by the Church of *Scotland*.

The counsel for the Defendants also submitted that, even if the proceedings which took place at the time of the erection of the chapel, and the subsequent regulations of the 29th of *March* 1803, amounted to a dedication of the building to religious worship according to the doctrines of the Church of *Scotland*, the effect of those proceedings and regulations had been entirely done away by the resolution formally passed by the votes of the congregation on the 4th of *November* 1833, and by which the resolutions of *March* 1803 were declared to be revoked and annulled. Besides, the suit was in point of form so irregular, that no decree, except an order for dismissing the bill, could be made upon it. The Plaintiffs were neither pew-holders, nor properly qualified as voters; for they had not paid up their arrears of pew rents, and they had, therefore, no interest in the question; *Burney* v. *Morgan*. (*a*)

Mr. *Miller*, for the personal representative of the surviving trustee of the lease.

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*Nov.* 17.

*The* LORD CHANCELLOR.

This is a bill by *Charles Milligan* and *Cornelius Sharp*, on behalf of themselves and all persons, except the Defendants,

(*a*) 1 *Sim. & Stu.* 358.

fendants, who, at the time of the alleged breach of trust, were holders of, or are now entitled to be holders of, seats or pews in the church or chapel comprised in a lease of the 14th of *July* 1800, or entitled to vote in the election of a minister of the said church or chapel; and the object of the bill is to have it declared that such lease, and church, or chapel, are held in trust for religious worship according to the institutions and observances of the Church of *Scotland*, with the necessary directions for the purpose of restoring and confining the form of worship and service in such church or chapel accordingly.

The only questions I have to consider, are, first, whether the property in question was held upon the trust alleged by the bill; secondly, whether there has been a breach of such trust; and, thirdly, if there has, whether the Plaintiffs are entitled to be relieved against such breach of trust, in a suit constituted as this is.

1. As to the first point, the case being before me only as it affects property, and the title to the property commencing with the lease in the year 1800, I have nothing to do with the history of the congregation at an earlier period, except in so far as it throws light upon the purposes of the trust so originating in that lease. It appears, however, that by an entry in the books of the congregation, dated the 18th of *June* 1798, recording the proceedings at a meeting had for the purpose of making arrangements for building a new church, the meeting call themselves the "*Scots* Presbyterian Church," and direct that the case should be laid before the "*Scots* Presbytery in *London*," with a request that they would give it their sanction and support: that, in a statement prepared for circulation at the time, the object is stated to be "to accommodate the members of the Established Church

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Church of *Scotland:*" that the project of building the new church was carried into effect by a committee of the congregation, assisted by a committee of the *Scotch* Presbytery in *London:* that the record of these meetings is headed "*Scots* church;" and that, in an entry dated the 21st of *May* 1799, they call themselves the "*Scotch* Presbyterian Congregation," and state their object to be to erect a new "*Scots* Presbyterian Church." It is also proved, that, on the 8th of *July* 1799, it was resolved that a stone containing the arms and motto of the Established Church of *Scotland* should be placed in the front of the new place of public worship. At a meeting of the 10th of *June* 1800, it was resolved that the lease should be in the names of the minister and elders, and the trustees for managing Mrs. *Drake*'s donation, and their successors in office. The chapel was opened, and two sermons were, on that occasion, preached in it by the ministers of two other *Scotch* presbyterian churches; and at a meeting of the 20th of *July* 1800, the chapel being now called the "New *Scots* Church," it was resolved, "that the treasurer be requested to write to each of the ministers, who was a member of the *Scottish* Presbytery in *London*, to solicit a collection from their congregations towards defraying the expenses of the building."

By the will of Mrs. *Drake*, dated the 9th of *January* 1730, a sum of 30*l.* per annum was given "to the protestant dissenting minister of the congregation of protestant dissenters at *Woolwich*," — an expression which concludes nothing upon the present question: but it appears that the 30*l.* per annum had been received by the minister of this congregation at a time when it was clearly a congregation of *Scotch* Presbyterians. The chapel having been erected, a lease of it, dated the 14th of *July* 1800, for sixty-one years, was granted, expressed to

to be in consideration of the expenses of erecting the *Scots* church or kirk; and it was declared to be held in trust to be assigned and disposed of as the elders and trustees of the said *Scots* church or kirk at *Woolwich* should direct; and, in default of such direction, "upon trust to permit and suffer the same to be used as and for a place of religious worship, and for such other purposes as by the custom of the Church or kirk of *Scotland* the same ought to be used;" and the trustees were "not to permit the same to be had or used for any other purpose than religious worship, and such other meetings and assemblies as by the custom of the kirk of *Scotland* ought to be there holden," without the written consent of the lessors, their executors, administrators, or assigns.

This is the most important part of the evidence upon the first point, as it shews the purpose for which the ground was obtained and the building erected; and it establishes beyond all doubt the affirmative of the first proposition, that the property in question was held upon trust to be used as a chapel for the *Scotch* Presbyterian form of worship. What followed the opening of the chapel is in conformity with this view of the case, and is strongly confirmatory of it. On the 29th of *March* 1803, it was resolved "that no minister receive a call, nor be appointed a pastor, of the congregation, who hath not been licensed to preach the Gospel, according to the regulations observed in the Established Church of *Scotland*." There is also in the minute-book an entry, of the 24th of *April* 1807, in which it is stated that the church was built for the purpose of worship according to the forms and ceremonies of the Church of *Scotland*, as by law established. On the 25th of *February* 1811, a question was made whether there should be singing before and after the service, as being a practice contrary

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contrary to the discipline of the Church of *Scotland*; and it was determined that there should not.

In answer to this, the evidence on behalf of the Defendants of some practices said to be contrary to the practice of the Established Church of *Scotland*, but not meeting these facts, can be of no weight. In the year 1829, Dr. *Blythe*, who had been regularly ordained pastor by the *Scotch* Presbytery of *London*, died. Mr. *Scott*, having been elected by the congregation, according to the regulations, application was made to the *Scotch* Presbytery of *London*, in the usual course, to moderate his call; and, upon his examination for that purpose, it was found that his tenets were not in conformity with the doctrines of the Church of *Scotland*: he declined to sign the confession of faith of the Church of *Scotland*, and he accordingly withdrew and resigned his claim to be pastor of the church.

No opposition appears to have been made to this decision of the *Scotch* Presbytery of *London*; but, on the contrary, measures were taken to procure another minister, and accordingly several licentiates of the Church of *Scotland* were invited to preach as probationers; and a party in the congregation having requested Mr. *Scott* again to become a candidate, he was, on the 22d of *January* 1831, again elected, notwithstanding the remonstrances of the *Scotch* Presbytery of *London*.

The consequence of this was, that the Presbytery of *Paisley* withdrew their licence from Mr. *Scott*, which sentence was, upon appeal to the General Assembly of the Church of *Scotland*, affirmed; and all ministers were prohibited from employing him to preach in their pulpits. Mr. *Scott*, notwithstanding, continued to officiate

ciate as minister until the month of *December* 1832, when he finally withdrew.

Upon the whole, it appears to me to be clear that the chapel was originally built and the lease obtained for the purpose of worship according to the doctrine and discipline of the *Scotch* Presbyterian Church; that the chapel continued to be so used, for upwards of thirty years; and that it was, therefore, held upon trust for that purpose; *Craigdallie* v. *Aikman* (*a*), *Attorney-General* v. *Pearson* (*b*), *Foley* v. *Wontner*. (*c*)

2. The next point is, I think, equally clear; and in fact little, if any, question is made about it. The second election of Mr. *Scott*, unless made in the hope that he might conform to the confession of faith of the Church of *Scotland* and be accepted by the Presbytery, was of itself a breach of trust; and undoubtedly the continuing to receive and employ him as minister, after his licence had been withdrawn by the sentence of the presbytery of *Paisley*, and that sentence affirmed by the General Assembly, was a direct departure from the trusts of the lease, and an open violation of the laws and regulations of the 29th of *March* 1803. The subsequent mode of providing for the service of the church, and, above all, the attempt to get rid of the laws and regulations of the 29th of *March* 1803 by the resolution of the 4th of *November* 1833, were further violations of the same trusts; and the issue joined by the Defendants is, not whether the present be or be not a departure from the system of the *Scotch* Presbyterian Church, but whether the majority of the congregation have not a right to

(*a*) 1 *Dow*, 1., and 2 *Bligh*, 529.

(*b*) 3 *Mer.* 353.; see p. 418.

(*c*) 2 *J. & W.* 245.

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to depart from it, and whether they have not effectually done so by the resolution of the 4th of *November* 1833.

I must assume the church to be vacant; and, in this state of circumstances, I have to consider according to what rule the election or appointment of a minister ought to take place. For this purpose, it is necessary to examine, not only the original trust upon which the lease of the building was held, but how far the parties to the resolutions of the 4th of *November* 1833 were competent to alter such trusts, and devote the lease and the building to other purposes.

This question may be solved without precisely defining the extent of the power of altering the laws and regulations of the 29th of *March* 1803, as defined and restricted by the ninth of those regulations. The resolution of the 4th of *November* 1833 was not an attempt to alter the laws, by the congregation existing as contemplated by the laws and regulations, (in respect of which, all pewholders of six months standing, and being, therefore, members of the congregation, as constituted by those laws and regulations, would have a vote, and in respect of which, no person taking a seat after the church had become vacant — a period which would probably be dated from the death of Dr. *Blythe* in *September* 1829 — would have been entitled to vote); but it was the resolution of a meeting of persons, calling themselves the congregation, who, from the course pursued after Mr. *Scott's* re-election in the year 1831, must have compelled many of the congregation, members of the church of *Scotland*, to withdraw, and comprising probably many individuals who were not entitled to vote according to the laws and regulations which they assumed the power of rescinding.

If,

If, however, it were necessary to come to any conclusion as to the extent of the power of altering the laws, possessed by persons entitled to vote, it might safely be assumed that such power did not extend to altering the fundamental principles upon which the association was formed, and destroying the trusts upon which the property was held, but only to altering the laws or making new laws, so far as might be consistent with such principles and trusts. It will be observed that the object of making the laws and regulations is, upon the proceedings stated to be "for preventing feuds and controversies, and preserving order and unanimity in the *Scots'* Presbyterian Church or Kirk at *Woolwich.*" I am, therefore, of opinion that the course adopted by the Defendants amounts to a breach of trust. (*a*)

3. It still remains to be considered, whether the Plaintiffs are entitled to be relieved against such a breach of trust, in a suit constituted as this is.

It is proved that the Plaintiffs are trustees of Mrs. *Drake's* charity; and that one of them, Mr. *Milligan*, was an elder; and that they are, therefore, trustees, though the lease is not legally vested in them. It is also proved that both of them were pewholders at the time when the wrong was committed, and had done what was requisite to entitle them to vote; that they were entitled to all the privileges of members of the congregation; and that they were, therefore, *cestuis que trust* of the property in question, and entitled to the assistance of this Court, to enforce the due execution of trusts, in which they had the same species of interest as the

(*a*) *Attorney-General* v. *Pearson*, 3 *Mer.* 353. *Craigdallie* v. *Aikman*, 1 *Dow*, 1.

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the plaintiffs had in the cases of *Davis* v. *Jenkins* (*a*), and *Foley* v. *Wontner*. (*b*) Of their title to sue, therefore, I have no doubt.

What then are the objections to the form of the bill? The other *cestuis que trust* are those members of the congregation, who at the time of the wrong committed were, by the laws and regulations, to be considered as entitled to the benefit of being members, and who are, I think, accurately described, in this bill, as persons on whose behalf the Plaintiffs profess to sue. The object of the bill is for the common benefit of all such persons, according to the purpose for which they were associated, and, therefore, within the rules which in such cases permit bills to be filed by some, on behalf of themselves and others. It is obvious, besides, that in no other way could justice be obtained for the injury complained of. The Defendants allege that the Plaintiffs, not having paid their rents, are not now pewholders, and, therefore, have no interest. That they were entitled however at the time when the wrong was committed is proved; and the Defendants cannot, by altering the form of worship used in the chapel, first deprive the Plaintiffs and others, in part, of their rights, and then allege such deprivation as a legal objection to their title to sue.

Upon these grounds I am of opinion, that the Plaintiffs are entitled to the decree which they ask.

I think the Plaintiffs ought to have their costs out of the fund. The acts which have rendered this suit necessary being the acts of a large majority of the congregation, I cannot throw those costs upon the Defendants; but as the Defendants have all concurred in the breach of trust, I do not think them entitled to their costs out of the fund.

(*a*) 5 *Ves. & B.* 151. (*b*) 2 *J. & W.* 245.

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## The ATTORNEY-GENERAL *v.* CRADOCK.

*July* 12. 18, 19.

An information was filed against the trustees of certain charities, and against a person, who, in concert with one of the trustees, had fraudulently effected the exchange of a farm, in which he and that trustee were jointly interested, for a portion of the charity lands; praying a general account of the charity estates, an apportionment of the rents among the different charitable objects, and a scheme, and praying also that the exchange might be declared void, and that a new trustee might be appointed in the room of the trustee who had so acted. To this information a demurrer for multifariousness, put in by the party who had colluded with the trustee in the exchange, was over-ruled.

THE information began by stating the substance of the will of *William Hutchinson*, dated the 13th of *September* 1693, by which the testator devised all his messuages and lands in *Streethead* and *Romaldkirk*, and also at *Cragg*, together with the almshouses which he had built at *Romaldkirk*, unto the persons therein named (one of whom was *Charles Whitell*) and their heirs, in trust for the support and maintenance of six poor alms people, and for buying them gowns and clothes to keep them warm in winter, and for the other charitable purposes for the benefit of the poor as therein mentioned; and he directed that the rector of *Romaldkirk*, for the time being, for ever, should be joined with the before-mentioned trustees, as one of the trustees and governors of the said almshouses and charity. The testator, then, reciting that he had caused a dwelling house in the town of *Bowes* to be fitted up as a school house for the instruction of the poor children of that parish, devised the school house, together with his farm at *Sleightholme*, and also a rent charge of 5*l.* per annum for ever, issuing out of his lands called *Annams*, to his friends therein named (most of whom were different persons from the persons appointed trustees of the other charity), upon trust, to apply the rents and profits in paying the salary of the schoolmaster and usher, and otherwise for the instruction of the poor children of his free school at *Bowes* as therein mentioned; and he appointed his said friends to be the trustees and governors of the school,

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school, and desired that *Charles Whitell*, or his heirs, should always be one of such trustees and governors, as well as a trustee and governor of the almshouses. The testator, after disposing of his other *Yorkshire* estates among his nephews and nieces, and giving certain pecuniary legacies out of his personal estate, declared that the residue should be distributed for the benefit of his almshouses and school, and among his kindred and relations who were legatees of his northern lands, or the monies arising from the sale thereof, as to his trustees should seem fit.

The information then stated that, upon the death of the testator, in the year 1698, his will was duly proved by certain of the executors; and that the respective trustees of the almshouses and free school accepted the trusts; and that the executors who proved the will, and who were also named as trustees of the almshouses and school respectively, applied the residuary personal estate in the purchase of other lands in the county of *York*, under the direction for that purpose contained in the will, as an addition to the charity estates; and that the charities had for many years past, and, as it was alleged, ever since the testator's decease, been managed as one trust, and the respective estates and funds thereof been mixed together indiscriminately, and the rents and profits of such estates and funds carried to one common account, and applied towards the support of both charities together, without regard to the distinct interest of each; and that for many years past the same persons had been trustees of both the charities united: that the charity estates had at various times been very irregularly dealt with by the trustees, and not in accordance with the testator's will: that new trustees had not been from time to time duly appointed; and that there was considerable difficulty in distinguishing to which of the charities

charities the several estates and funds, which were subject to the charitable trusts, respectively belonged.

The information further stated that, by indentures of lease and release and appointment, dated respectively the 14th and 15th of *July*, 1810, the messuages and lands therein particularly described, being the estates belonging to the said charities, were conveyed to and vested in certain persons therein named and their heirs, as trustees, upon the trusts declared by the testator's will; and that of those trustees there were now living the several persons named in the information (and among others *John Headlam*), all of whom claimed to be trustees of the charity estates and governors of the charities; and that the Rev. *George Price*, as the rector of the parish of *Romaldkirk*, claimed to be, and had always acted jointly with them as, one of such governors and trustees.

The information further stated that part of the charity estates consists of the farm of *Sleightholme*, containing about eighty-five acres, which farm was, in the year 1832, in the occupation of *Sheldon Cradock* under a lease from the trustees for a long term of years still unexpired, and at a very low annual rent; and that another part of the charity estates consists of a farm, called the *Charity Pasture* farm, containing about eighty-five acres, together with forty-nine sheepgates on the uninclosed part of *Gilmonby* moor; and that the said farm and sheepgates were in the year 1832, and for several previous years, in the possession of a yearly tenant: that in that year *Sheldon Cradock* and *John Headlam*, who was one of the trustees, claimed to be jointly entitled in fee simple to a farm called *Pryrigg* in the parish of *Bowes*, containing about seventy-three acres: that in the same year *Headlam* claimed to be entitled in fee simple to certain small parcels of land at *Howlowgill* in the parish of

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*Bowes*, containing about six acres; and that *Cradock* and *Headlam* then entered into a plan to procure from the trustees of the charity estates the fee simple of the farm at *Sleightholme*, and the *Charity Pasture* farm and sheepgates, in exchange for the farm called *Pyrigg*, and the parcels of land at *Howlowgill*; and that it was arranged between them, that *Cradock* should retain in severalty the farm of *Sleightholme*, whereof he was then tenant, and that *Headlam* should take in severalty the *Charity Pasture* farm and sheepgates: that some proceedings were taken in the same year (1832), in order to effectuate such exchange, under the provisions of the 1 & 2 *Geo.* 4. *c.* 92.; and that for that purpose valuations of the lands to be exchanged were made; but that such valuations were grossly inaccurate, and that the lands proposed to be taken from the charities were considerably more valuable than those which were proposed to be given in exchange to the charities; and that the exchange was, with reference to the interests of the charities, a very improvident transaction: that several of the trustees refused to give it their sanction; and that the valuation was never submitted to a regular meeting of the trustees; but that nevertheless *Cradock* and *Headlam* caused a deed of bargain and sale and exchange of the lands so to be given and taken in exchange, to be prepared, and having themselves executed the same, they procured it to be executed by some of the trustees: that the deed of bargain and sale was never enrolled in the Court of Chancery, pursuant to the above-mentioned act of parliament, and that in other respects the provisions of that act were wholly disregarded: that *Cradock* and *Headlam* nevertheless insist that the exchange was valid and effectual; and that *Cradock* insists that he is now the absolute owner of *Sleightholme*, and is no longer in possession thereof as the tenant of the trustees, and he refuses, with the concurrence of *Headlam* and others of the

the trustees, to pay any rent to the trustees for the same: that *Headlam* in like manner insists that he has become the absolute owner of the *Charity Pasture* farm and sheepgates, and claims the rents and profits thereof, for his own sole use.

The information further stated that the trustees had never, on behalf of the charities, entered into possession or receipt of the rents, and profits of the lands of *Pyrigg* and *Howlowgill*, so alleged to have been given to them in exchange; and that for many years prior to the last appointment of trustees in the year 1810, the charity estates were very carelessly managed; and that the particulars thereof, and the legal title thereto, were now involved in great doubt and obscurity: that the charity estates had considerably increased in value, and were likely still further to improve: that their present annual income exceeded 290*l.*, and that additional allowances had been, from time to time, made by the trustees, as well to the master and usher of the school, as to the six poor persons inhabiting the almshouses; but that doubts were entertained how far the rents and profits of the charity estates had been applied with a due regard to the distinct interests of each of the charities.

The information prayed an account of the charity estates; a reference to ascertain whether it was desirable that the two charities and their estates should continue united under one management, and, if so, then to ascertain in what proportions the rents should be divided between them; and a scheme; that it might be declared, that the alleged exchange was void, and that *Cradock* and *Headlam* were not entitled to the farm of *Sleightholme*, and the *Charity Pasture* farm and sheepgates respectively; and that the alleged deed of bargain and sale might be cancelled; that *Cradock* might account for the rents of *Sleight-*

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*Sleightholme* under his lease; that *Headlam* and *Cradock* might be severally restrained from taking possession on their sole account of the *Charity Pasture* farm; that *Headlam* might be removed from being a trustee; and that new trustees might be appointed in his room, and in the room of such of the other trustees as were dead.

To this information, *Cradock* and *Headlam*, and the other trustees under the indentures of *July* 1810 who were living, together with the heiress at law of *Charles Whitell*, and the rector of *Romaldkirk*, were made Defendants.

The Defendant *Cradock* demurred to the information, for multifariousness; and the Vice-Chancellor having allowed the demurrer, an appeal was presented against his Honor's order.

Mr. *Wigram*, Mr. *Richards*, and Mr. *Smythe*, in support of the appeal.

The information prays that the estates and funds belonging to the charities may be ascertained, and the income properly apportioned between the two trusts. That object cannot be attained without impeaching the right of the Defendant *Cradock* to the farm of *Sleightholme*, which formed a part of those estates, and to which, according to the statement in the information, he has succeeded in acquiring an apparent title by means of an exchange, effected in concert with, and through the instrumentality of *Headlam*, one of the trustees. *Cradock* having thought fit to mix himself up in the transaction with *Headlam*, and having obtained a colourable title by what must be considered as a breach of trust, has made himself constructively a trustee; and he is, therefore, accountable with the other trustees for such part

part of the trust property as may now be in his possession. Nor does it lie in his mouth to take advantage of a merely technical objection, grounded upon his own wrongful act; more especially as no inconvenience can result to the charities from uniting him in one record with the other Defendants. *Campbell* v. *Mackay* (*a*) is a direct authority for the frame of this information.

Mr. *Jacob* and Mr. *Bethell*, *contrà*.

This information attempts to include in one suit matters which are quite distinct and heterogeneous. It asks an account of the estates of both the charities, an apportionment of the income between the two, and a scheme. It seeks moreover to inquire into and rescind a transaction, in which it is alleged that the Defendant *Cradock*, acting in concert with his co-defendant *Headlam*, has acquired part of the charity estates, by what, as regards *Headlam*, must be considered a direct breach of trust. The latter object ought to have been made the subject of a separate suit against those two Defendants only. What has *Cradock* to do with the nature and objects of the charities, or the general account of the estates? or why should he be involved in matters, with which, in any result, he can have no concern, and in which, if the exchange now challenged be eventually upheld, it would be most unjust that he should be involved? The argument is, that because an account of the charity estates is sought, all persons claiming interests in those estates, although by separate and independent transactions, must be made parties. Such a course, however, is contrary to the practice of the Court, and would, in many cases, be attended with extreme inconvenience and hardship.

(*a*) 1 *Mylne & Craig*, 603.

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ship. Suppose that each of these trustees (and there are more than a dozen of them) had entered into a separate contract with some third party, a stranger, for the sale of a distinct portion of the charity estates, can it be contended that all these contracts, and the different parties to them, ought to be included in one common information? With eleven twelfths of such an information, each of the purchasers could truly say he had no concern. The difficulty and injustice would be still greater, if, in addition to a multitude of transactions, with all but one of which each of those defendants had no concern, the suit embraced among its objects a general account of the estates, and a plan for the future administration of the charities. Suppose a tenant of the estate, in collusion with one of the trustees, or in any other way, to have refused for a long time to pay rent, does that circumstance furnish a reason why he should be mixed up in a suit, the main objects of which have no reference whatever to him? The doctrines, as well as the decisions, in *Salvidge* v. *Hyde* (*a*) and in *Saxton* v. *Davis* (*b*), clearly shew that such a bill cannot be supported. *Campbell* v. *Mackay* has no application; for the convenience in that case was wholly on the side of including the three trust funds (in all of which the Plaintiffs were jointly interested) in the same suit.

Mr. *Richards*, in reply, submitted that the language of Lord *Eldon*, in his judgment on the appeal in *Salvidge* v. *Hyde*, fully justified the frame of this information. His Lordship obviously considered that, provided a proper case were made,—provided the purchaser were inseparably mixed up in the impeached transaction with

(*a*) 5 *Mad.* 138. and *Jac.* 151. (*b*) 18 *Ves.* 72.

with the trustee, the case against both might be united in one bill; and such a case was made here against the Defendant *Cradock*.

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*The* LORD CHANCELLOR (after stating the substance of the information).

*July* 19.

The Defendant *Cradock* says, that he is improperly mixed up with the accounts relative to the other property of this trust; and that, though the information states a case against him which, if true, might entitle the Attorney-General to sue him in respect of the property which is alleged to have been separated from the charity, he ought not to be made a party to a suit, the object of which is to have a general account taken of the property of the charity, and an apportionment of that property to the several purposes to which it is alleged to belong.

The first point to be determined is, whether he is not so involved with that part of the property which *Headlam* is said to have diverted from the charity, as to make it impossible to proceed against *Headlam*, with respect to that property, without joining *Cradock*; and I think that, under the circumstances stated, it is quite impossible that the suit could be prosecuted in the absence of *Cradock*. The alleged breach of trust consists in *Headlam* and *Cradock* diverting an estate, subject to charitable purposes, by way of exchange for an estate which belonged to them jointly. The exchange complained of is one transaction, and the consideration is property in which they were jointly interested.

If

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If that be so, the question is, whether the objection of multifariousness can possibly apply; whether a party, who has been implicated with a trustee in a breach of trust, as to part of the property which is the subject of the information, can say that, in order to accommodate him, you shall sever the case against that particular trustee, from the case against the trustees generally. In many cases it would be utterly impossible so to proceed; for if you are bound to separate that part in which the trustee was concerned with the other party, you may make that suit defective which ought to be instituted against all the trustees in respect of the whole interest in the charity. Now this suit would be defective, if that part which relates to the transaction in which *Headlam* and *Cradock* were together concerned were separated from the rest, the object being to have an account taken of the whole of the charity property, and an apportionment of the property among the different purposes for which it was designed. Any thing more inconvenient than having against *Headlam* one suit for that part of the account which relates to the property in respect of which *Cradock* is interested, and another suit for the remainder, there could not well be. It is obvious that that would be a most inconvenient and improper mode of carrying on the suit. Would it ever occur to any one to file one bill against the trustee for one part of the transaction, and another bill for another part of the transaction?

Then, is a party entitled to raise this objection who has made himself, by uniting with the trustee in a breach of trust, part and parcel of the transaction? The object of the rule against multifariousness is to protect a Defendant from unnecessary expense; but it would be a great perversion of that rule if it were to impose upon the Plaintiffs, and all the other Defendants, the expenses of

two

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two suits instead of one. The object of the suit is to establish that *Cradock* has, by means of the transaction stated in the information, become a trustee of part of the charity estate. Suppose he had been an actual instead of a constructive trustee, and the object was to have accounts taken, and an administration made of the whole of the charity property, could he object on that ground, that he was a trustee only of a part of the charity property, and that he could not be made a party to a suit relating to the whole? If that were to prevail, it would be directly against the decision of the Vice-Chancellor, which I affirmed, in *Campbell* v. *Mackay*. (*a*) There, some of the parties were trustees of part only of the trust property in question; but the trusts were so united, by the allegations of the bill, that the whole was made one fund; and first the Vice-Chancellor and afterwards myself were of opinion that, in such a state of circumstances, the objection of multifariousness could not be sustained. If that be so, according to the decision in *Campbell* v. *Mackay*, when the Defendant is a trustee only of part, but which part is so blended with the remainder as to make it improper to separate it, is greater favour to be shewn to a person who becomes one of the trustees by joining with another trustee in committing a breach of trust? The doctrine of multifariousness would be carried much too far if that were to be the case.

That would have been the opinion which, independently of any decision, I should have formed upon principle, and upon the case of *Campbell* v. *Mackay*, in which both his Honor, the Vice-Chancellor, and myself concurred. The present case, however, is almost identical with *Saltidge* v. *Hyde* (*b*), not according to the facts of that case, but

(*a*) 1 *Mylne & Craig*, 603. (*b*) 5 *Mad.* 138. and *Jac.* 151.

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but according to the facts of the case which Lord *Eldon* assumed was brought before him. In *Salvidge* v. *Hyde* there was not such a union; there was a distinct case against the Defendant *Laying*, who was alleged to have improperly purchased part of the testator's estate. The Vice-Chancellor, Sir *J. Leach*, was of opinion that that of itself would not raise the objection of multifariousness, upon the ground that there was one entire object, namely, the administration of the estate.

When the case came before Lord *Eldon*, he did not go to that extent, nor did he concur in the opinion of the Vice-Chancellor. *Culliford* was a trustee who, as well as *Laying*, was alleged to have purchased part of the trust estate. It was there argued, at the bar, that the land sold to *Culliford* was in part included in the land sold to *Laying*, so that the purchases were necessarily connected. The parties at the bar were driven to that argument; and then Lord *Eldon* says, "If *Culliford* purchased for himself, which he could not do, and then *Laying* bought of him, that would be one thing; but what charge is there in the bill that *Laying* purchased what *Culliford* bought? If an executor, having a power to sell, agrees to sell to *A. B.*, can a bill be filed against him, and also for a general administration of the estate? He may have made infinitely too good a bargain with the trustee to sell, one that the Court would not allow to stand; but that is no ground for making him a party to the general administration. The case must depend on the charges of the bill: they may be such as to unite persons who are ordinarily disunited." (*a*) It is impossible to misunderstand what Lord *Eldon* means. He says, in effect, "You are proceeding against *Culliford*. If the allegation in the bill connects the other party with the purchase

(*a*) *Jac.* 155.

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purchase by *Culliford*, I don't dispute that he is properly joined; but here is a failure of that ground, because the bill does not allege any connection between the purchase by *Culliford* and the purchase by *Laying*:" and upon that ground, obviously, Lord *Eldon* decided the case; namely, because the two purchases were not connected. Now, here it is different; because there is one property, one consideration, and it is obviously impossible to proceed against one party without the other.

I consider, therefore, not on general principles only, but on the distinct authority of Lord *Eldon*, that the objection of multifariousness cannot be sustained. The case put to him from the bar in *Salvidge* v. *Hyde*, and on which he observes, was as nearly as possible identical with this. The demurrer must be over-ruled. (*a*)

Order reversed.

(*a*) See *Pearse* v. *Hewitt*, 7 *Sim.* 471.

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## SIMPSON *v.* Lord HOWDEN.

*June* 17. 23.
*Aug.* 30.

There is no jurisdiction in equity to order a legal instrument to be delivered up, on the ground of illegality which appears upon the face of the instrument itself.

During the progress of a railroad bill through parliament, the promoters of the bill agree with an owner of land on the intended line, that, if the bill shall pass, they will endeavour, in the next session, to obtain the sanction of parliament to a deviation of the line.

Whether such an agreement is legal, *quære*?

THE Master of the Rolls having over-ruled a general demurrer to the bill, the Defendant (Lord *Howden*) now appealed.

The

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The allegations of the bill are stated in the first volume of Mr. *Keen*'s Reports. (*a*) The first sentence of the witnessing part of the agreement in question should, in conformity with the allegation in the bill, have been stated thus; viz., "It was witnessed that Lord *Howden* thereby agreed that, *on condition* of the stipulations and agreements thereinafter contained being observed and performed, he did thereby withdraw his opposition to the bill, and give his assent thereto."

The prayer of the bill was, that it might be declared that the agreement was against public policy, and void in law; and that it might be delivered up to be cancelled; and that the Defendant might, in the mean time, be restrained from further proceeding at law, to enforce payment of the sum of 5000*l.* before mentioned; and that, if it should, for any reason, appear that the agreement was consistent with public policy, and that the same therefore was not void, and ought not to be delivered up, then it might be declared that, according to the true intent and meaning of the agreement, the sum of 5000*l.* did not become payable to the Defendant, except upon such portion of the lands as was described in the maps and plans deposited for the purposes of the act, or some part of the same, being taken and used by the railway company, and by way of additional compensation above the purchase-money to be paid to the Defendant for the damage which his lands would thereby sustain; or that it might be declared that the condition and stipulation contained in the agreement for the payment of the sum of 5000*l.*, upon any other construction thereof, was improperly acquired and obtained from the Plaintiffs; and that the Defendant might be thereupon restrained from proceeding at law for the payment of the sum of 5000*l.*

(*a*) Page 583.

5000*l.* until some part of his lands described in the before-mentioned maps and plans should have been taken and used by the company.

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The general line of argument taken in the Court below was also adopted on the appeal; but it was further contended, in support of the demurrer, that there was no jurisdiction in equity to order an instrument to be delivered up upon the ground of its illegality, if such illegality appeared on the face of the instrument itself.

The *Solicitor-General*, Mr. *Koe*, and Mr. *Bethell*, in support of the demurrer.

Sir *C. Wetherell*, Mr. *Wigram*, and Mr *Wilbraham*, in support of the bill.

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*The* LORD CHANCELLOR. *Aug.* 30.

This was an appeal from an order of the Master of the Rolls, over-ruling a demurrer; the case, therefore, must depend altogether upon the statements in the bill. The bill states the formation of a company, in the year 1835, for the purpose of making a railway, to be called "The *York* and North Midland Railway Company," to which the Plaintiffs were subscribers; that the proposed railway, as described in the plans deposited according to the regulations of parliament, passed through part of the Defendant's lands; that afterwards, and when it was too late to alter the line, the Defendant expressed his dissent, and subsequently petitioned the House of Commons against the bill; and that thereupon an agreement was entered into between the Defendant and the Plaintiffs, in their individual capacity, dated the 4th of *May* 1836, whereby they agreed, in consideration of

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his assenting to the bill, that they would endeavour, in the next session, to obtain an act to deviate the proposed line, and to adopt another line; and, within six months after the passing of the act, pay him 5000*l.* towards compensation for damage by the deviated line; and if they should not succeed, in the following session, in getting an act for the deviated line, then to pay so much more, for additional compensation for the original line, as certain referees should award; and should pay 100*l.* per acre for all land taken for the purposes of the railway. The bill then states that the act passed, and that it was provided that the powers of taking land for the purposes of the act should cease, if not exercised within two years. It then states that, after the passing of the bill, and before the Company had taken any part of Lord *Howden*'s land, a new and better line was suggested to them, avoiding all Lord *Howden*'s land; and that they had presented a petition to parliament, to enable them to adopt this amended line. The bill then alleges that the agreement was against public policy and illegal, and that it was not intended that the 5000*l.* should be paid, unless some damage was sustained; but that Lord *Howden*, nevertheless, had brought an action for the 5000*l.*; and prays that the agreement may be cancelled, or that it may be declared that the 5000*l.* was not payable unless the land were taken; and for an injunction to restrain Lord *Howden* from proceeding in the action.

To this bill a general demurrer was put in; and in support of it the argument was, first, that the contract was not void, as being illegal or against public policy, and that there was therefore no ground for interfering with the obligation imposed by it; or, secondly, if it be impeachable, yet, as the grounds of objection to it appear upon the face of the contract itself, and might there-

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therefore be taken advantage of at law, equity ought not to interfere.

The Master of the Rolls, as I am informed, decided the case, and over-ruled the demurrer, upon the first point, not particularly alluding to the second.

To form an opinion upon the first point, it is necessary to analyse the contract. It is an agreement, in the event of the bill then contemplated passing, and the railroad thereby authorised being made, to pay to Lord *Howden* a certain sum, as compensation for the damage his property might thereby sustain. To make such arrangements before similar bills are proposed to parliament is much in the usual course, and is, in fact, the ground of many of the assents given to the passing of such bills. In that there is not anything illegal; and the case was not put upon this ground.

Then, as to the bill proposed to be introduced as a substitute for that first intended to be passed, namely, the bill for the varied line, the case is much the same. That, too, was an agreement for the damage which in such case Lord *Howden* might sustain, and in that, taken by itself, there would not be any thing illegal. The illegality, however, is said to consist, not in providing for each of these alternatives, but in the provision that the projectors of the first line, and those who were to advocate the bill for carrying it into effect, should use their best endeavours to procure an act for another line, and so to defeat the plan proposed by the bill which they were seeking to have passed into a law. Having in contemplation an alteration in the line, it cannot be supposed that the company would interfere with the lands in the original line; but the expectation that the original line would be followed, might, undoubtedly,

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operate upon the plans of individuals dealing with their lands in that line, as the apparent certainty that their lands would not be affected by the proposed railway might operate upon the plans of individuals in the neighbourhood dealing with their lands, and, amongst others, of those having lands in the deviated line. If, however, the contract grounded upon the deviated line had not been entered into until after the first act had passed, the same inconvenience might have arisen to individuals, and yet no one could have supposed that such a contract, made at that time, would have been illegal. The illegality must, therefore, consist in this, that it operates as an inducement to persons applying to parliament for certain powers, not to use such powers, but to endeavour to substitute others for them, by a new act, at a subsequent period. Is it, in short, contrary to public policy, and therefore illegal, that persons should apply to parliament for a certain object, and for certain powers to carry that object into effect, intending, at a future period, to apply for other powers to effect the same object? But as, from the opinion I have formed upon the other point, this question will most probably come on for decision in another court, I abstain from pursuing it any further.

The second objection to the bill is, that the illegality, if any, appearing upon the face of the contract, is cognisable at law, and that equity, therefore, ought not to interfere. This must depend upon authority; it being alleged, for the Defendant, that there was no instance of a court of equity having entertained jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality, which appeared upon the face of it; and in which case, therefore, there was no danger that the lapse of time might deprive the party to be charged upon it of the means of defence.

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In *Colman* v. *Sarrel* (*a*), a case is referred to, in the argument, as having been then recently decided by Lord *Thurlow*, in which he is stated to have held, that, where an instrument cannot be proceeded upon at law, there is no ground to come into equity for relief; and in the case of *Colman* v. *Sarrel* itself, his lordship dismissed the original bill, seeking to have a deed delivered up, although, upon a cross bill seeking a performance of its provisions, he gave the parties an opportunity of trying the question of illegal consideration at law. In *Franco* v. *Bolton* (*b*), Lord *Thurlow* allowed a demurrer to a bill to set aside a bond, alleged to have been given *pro turpi causâ*, after a verdict for the obligee, although the illegality of the consideration did not appear upon the face of the bond. In *Gray* v. *Mathias* (*c*), a bill was filed to set aside a bond which appeared, upon the face of it, to have been given *pro turpi causâ*. The question of jurisdiction upon that ground was argued; and Chief Baron *Macdonald*, with the assent of the three other Barons, dismissed the bill with costs, not professing to decide upon the question of jurisdiction, but, what amounts to the same thing, that in such a case a court of equity ought not to interfere; stating that the Plaintiff himself alleged that the instrument was a piece of waste paper, and was good for nothing, upon the face of it; that, whenever it was produced, it would appear to be good for nothing, the Plaintiff himself alleging that he had an irrefragable defence against it. This is a very distinct authority against the jurisdiction contended for by the Plaintiffs. The cases upon the Annuity Acts, *Byne* v. *Vivian* (*d*), *Byne* v. *Potter* (*e*), and *Bromley* v. *Holland* (*g*), all in the fifth volume of *Vesey*, and the

(*a*) 1 *Ves.* jun. 50.
(*b*) 3 *Ves.* jun. 368.
(*c*) 5 *Ves.* jun. 286.
(*d*) 5 *Ves.* 604.
(*e*) *Ibid.* 609.
(*g*) *Ibid.* 610.

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the latter case reported, upon appeal, in the seventh volume of *Vesey* (*a*), do not appear to me to be applicable to the present case; for in none of them did the circumstance which created the invalidity of the transaction appear upon the face of the deeds, and in none of them were the objections confined to defects in the memorial, but depended upon evidence dehors, such as the mode of paying the consideration, of which the evidence might, at a future time, be lost. In the latter of these cases, *Bromley* v. *Holland*, Lord *Alvanley* expressed great doubt as to the jurisdiction, but thought himself bound by the prior decision of *Byne* v. *Vivian*. When the same case came before Lord *Eldon* (*b*), he expressed a similar opinion as to the jurisdiction, but supported it, in that case, upon the preceding authorities, and by suggesting (*c*) that, by destroying the deed and giving evidence of its contents, the variance between the deed and the memorial might no longer appear. He also refers the jurisdiction to deliver up bills and notes to a similar ground, viz. that the evidence might be lost; and observes (*d*), "There is considerable difference between the case of a bill of exchange upon which, on the face of it, there can be no demand, and an instrument which, upon the face of it, purports to affect real property; and that is to be applied in some measure to the case of a bill without a stamp;" and he again says, "I do not go the length that, if it is clear that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out of the possession of the party who can make no use of it beneficial to himself." (*e*) In *Jervis* v. *White* (*g*), upon a motion by one partner to have

(*a*) Page 5.
(*b*) See 7 *Ves.* 16.
(*c*) Page 20.
(*d*) Page 21.
(*e*) See page 22.
(*g*) 7 *Ves.* 415.

have a bill delivered up which had been accepted by the other partner in the name of the partnership, there are some observations of Lord *Eldon* which have been supposed to favour the jurisdiction contended for; but they must be taken with reference to the subject he was discussing, and the circumstances of the case, which, as stated in the sixth volume of *Vesey* (*a*), exhibit a case of gross fraud in the formation of the partnership, and, therefore, in the origin of the legal obligation against which protection was sought by the bill. In that case, there could be no doubt, upon that statement, as to the jurisdiction of this Court. So, in *Ware* v. *Horwood* (*b*), the facts, as stated in the tenth volume of *Vesey* (*c*), amounted to gross fraud in the origin of the transaction.

Of the general jurisdiction of this Court, therefore, there could be no doubt; and Lord *Eldon*, in adverting to the general question of jurisdiction, is so far from asserting it as was contended for by the Plaintiffs, that he refers it to cases in which the legal question arises incidentally, or in which "the variety and multiplicity of the suits that might be brought at law and in equity furnish some principle in equity, of which the Court will take advantage for the purpose of deciding, once for all, whether the securities be valid or not." (*d*) In *Hayward* v. *Dimsdale* (*e*), the deed was impeached, upon the ground of oppression, and because it was executed in contemplation of bankruptcy, and that the sum stated in it was not what was supposed to be due, but a sum supposed to be fully equal to the debt, and therefore inserted as a security. No illegality appeared upon the face

(*a*) Page 738.
(*b*) 14 *Ves.* 28.; see pp. 32, 55.
(*c*) Page 209.
(*d*) 14 *Ves.* 33.
(*e*) 17 *Ves.* 111.

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face of the deed, and many of the grounds upon which it was impeached were purely equitable. The demurrer, therefore, was necessarily bad, and the case has no application to the present. It is to be observed, as to one class of cases generally referred to upon this subject, viz., bills to set aside annuities, that they not only depend upon facts not appearing upon the face of the instrument, but that, except in those cases in which the statute gives authority to set aside the instrument, law affords a very inadequate remedy; for, first, the annuitant may repeat his action as often as the annuity becomes payable, and if the invalidity of the annuity be fully established, still the consideration money would remain in hands which ought not to retain it; and by the mode in which courts of equity deal with the payments on account of the annuity as against the consideration paid for it, an account is raised which a court of equity alone can properly take. It is not a mere declaration of the illegality of the instrument, but it involves the duty of restoring the parties, as nearly as possible, to their original situation, which a court of equity alone can effect. So, the cases upon policies of insurance always represent transactions, which, if true, would afford a defence to an action, yet, as proceeding from misrepresentation or fraudulent suppression, clearly give jurisdiction to courts of equity; and, in these cases also, the return of the premium would be to be arranged, if such cases were ever brought to a hearing, of which, however, there are very few precedents. In *Jackman* v. *Mitchell* (*a*), Sir *S. Romilly* stated that there was no case of a decree for delivering up a bond appearing upon the face of it to be void, and referred to the case of *Ryan* v. *Mackmath*. (*b*) Lord *Eldon* did not controvert that proposition, but said, that the proposition did not arise,

(*a*) 15 *Ves.* 581.; see p. 585. (*b*) 3 *Bro. C. C.* 15.

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arise, the instrument not being bad upon the face of it, but bad only as it might be proved to be so *aliunde*. In *Harrington* v. *Du Chastel*, referred to by Lord *Eldon* in *Bromley* v. *Holland* (*a*), and reported in a note in the second volume of Mr. *Swanston's Reports* (*b*), the illegality did not appear upon the face of the bond, and the corrupt contract was not between the obligor and obligee; and, upon the motion for the injunction, the Lord Chancellor expressed doubts whether a court of law could relieve. In *Law* v. *Law* (*c*), the Lord Chancellor says, "It is agreed on all hands that this bond is good at law; wherefore the representative of the obligor is obliged to come hither for relief."

If, then, there be no case in which this jurisdiction has been exercised, and if I find Lord *Thurlow*, in the case referred to in *Colman* v. *Sarrel*, and the Court of Exchequer in *Gray* v. *Mathias*, deciding against it; Lord *Alvanley*, in *Bromley* v. *Holland*, regretting that the jurisdiction had been assumed in the cases of annuities; and Lord *Eldon*, in the same case, directly, and in *Ware* v. *Horwood* inferentially, disclaiming the jurisdiction contended for; it only remains to be considered, whether any such cogent reason exists in the present case, as to make it my duty to assume the jurisdiction, and so, for the first time, to establish a precedent for it.

Now, I find no fact stated in this bill impeaching the legality of the instrument, beyond what appears upon the face of the instrument. If there should be a decree for the Plaintiffs, it would be merely to deliver it up—no consequential relief, no account to be taken, no provision for restoring the parties to their original position.

(*a*) 7 *Ves.* 3.; see p. 19.
(*b*) Page 158. n.
(*c*) *Cas. tem. Tal.* 140.

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sition. Whether the Defendant proceed in the action he has brought, or bring another, the same questions must be raised and decided at law as are raised in the bill. Why should a court of equity, in this case, assume to itself the decision of a mere legal question, contrary to its usual practice? Would it do so if a bill were filed to have a note or bill delivered up drawn upon unstamped paper, or upon a wrong stamp? But what would be the consequence of retaining such a bill? Unless an injunction were granted, the action would proceed. If the Plaintiff at law were to recover, it can hardly be supposed that this Court would restrain execution, upon its own opinion of a point of law, after a court of law had decided it in favour of the demand. That a party has not effectually availed himself of a defence at law, or that a court of law has erroneously decided a point of pure law, is no ground for equitable interference; and if the Defendants at law obtain a verdict, and the illegality of the instrument be thereby established, the whole object of the Plaintiffs in equity will be obtained. Is it, then, a case in which a Court of equity will, by injunction, restrain further proceedings in the action, and take to itself the exclusive jurisdiction over this legal question? I apprehend not; for not only will the Court wish, in some way, to obtain the opinion of a court of law upon a purely legal question, but, by permitting the action to proceed, it will afford to the parties the most speedy, cheap, and satisfactory means of deciding the question between them.

As to the points raised by the bill, whether, in the events which have happened, the Plaintiffs in equity are liable to pay the 5000*l.*, it is purely a question of construction, which may be dealt with at law quite as well as in equity, and which, therefore, cannot affect the question of jurisdiction.

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In the absence, therefore, of any decision in favour of the jurisdiction contended for by the Plaintiffs, and with the authorities against it to which I have referred, and seeing no benefit which can arise, in this or any other such case, from this Court assuming the jurisdiction, I am of opinion that the demurrer ought to be allowed.

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## TAYLOR and Another *v.* SALMON and Another.*

*July* 29. 31. *Aug.* 10.

Where a defendant against whom an order for a serjeant-at-arms has issued, for want of an answer, and *non est inventus* has been returned, files his answer, and gets the common order for clearing his contempt on payment of costs, and the answer is afterwards successfully excepted to for insufficiency, the plaintiff is entitled to take up and go on with the process of contempt from the point at which it was stopped by the order for clearing the contempt: and therefore a sequestration, for want of an answer to the exceptions, sued out immediately on the defendant's submitting to answer them, and a consequential order to take the bill *pro confesso*, are regular.

Under the circumstances, a defendant who had got into contempt to a sequestration for want of an answer, and against whom an order for taking the bill *pro confesso* had been obtained, and a decree made accordingly, was allowed, notwithstanding, upon certain terms, and upon paying the costs of all the prior proceedings, to put in an answer, with a view to the cause being regularly heard.

IN the month of *June* 1836, the Defendant *Salmon* entered into an agreement with Lord *Dunally* for a lease of certain mines in *Ireland;* and on the 7th of *January* 1837 the Plaintiffs filed their bill, stating that *Salmon* had entered into the agreement, as the agent and on behalf of the Plaintiffs, and praying to have the benefit of the agreement. To this bill the Defendant *Salmon* filed a demurrer, which, on argument, was allowed, with liberty to amend; and on the 14th of *February* 1837 the bill was amended.

The time for answering the amended bill, according to the new orders, expired on the 18th of *April* 1837; and on the 22d of *April* a warrant was taken out for further time to answer: on the same day an attachment was sealed

* *Ex relatione* Mr. *Wakefield.*

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sealed against the Defendant *Salmon* for want of an answer, and the attachment having priority to the warrant, the warrant was abandoned. On the 29th of *April*, an order was obtained for a serjeant-at-arms. On the 12th of *May*, a return of *Non est inventus* was made to that process, and on the same day the answer was filed. On the 13th of *May*, the Defendant *Salmon* obtained the usual order for clearing his contempt, and paid the costs.

Seventeen exceptions were afterwards taken to the answer, and on the 2d of *June* the Defendant submitted to answer the exceptions. On the following day (the 3d of *June*), the Plaintiffs obtained an order for a sequestration, for want of an answer to the exceptions, and, on the 6th of *June*, an order to take the bill *pro confesso*. The Defendant, on the 7th of *June* (the order of the 6th of *June* not having been drawn up, and the Defendant having no notice of it), filed his answer to the exceptions; and, on the 8th of *June*, the order to take the bill *pro confesso* was drawn up, passed, entered, and served.

An application was made to the Vice-Chancellor to discharge the orders for a sequestration, and for taking the bill *pro confesso*, for irregularity. That application was refused with costs; and, on the 16th of *June*, an order was made to take the further answer off the file with costs.

On the 30th of *June*, notice was given that the Lord Chancellor would be moved to discharge the orders of the 3d, 6th, and 16th of *June*, respectively, for irregularity; or that the orders of the 6th and 16th of *June* might be discharged on such terms as the Court should think fit; or that the order of the 6th of *June* might be discharged,

charged, and the Defendant *Salmon* be at liberty to file an answer to the exceptions.

On the 28th of *July*, the cause was heard as a short cause, and the Plaintiffs' bill read as confessed, and a decree made. On the 29th and 31st of *July*, the motion was made, before the Lord Chancellor, by Mr. *Wakefield* and Mr. *Wray*, and opposed by Mr. *Wigram* and Mr. *Loftus Wigram*.

*The* LORD CHANCELLOR held that the proceedings had been regular; but, at the same time, expressed an opinion that the Defendant ought to be allowed to put in his answer to the exceptions, and directed the draught of such intended answer to be handed over to the Plaintiffs' solicitor.

This was done, and certain objections in writing were made thereto, which were submitted to, and the draught altered accordingly.

On the 10th of *August*, the matter was again brought before the Lord Chancellor; when his Lordship ordered that the order of the 6th of *June* should be discharged; that the Defendant *Salmon* should file such draught answer within a week, and should produce, and leave with his clerk in court for the usual purposes, the several letters and papers mentioned in that and in his former answer to be in his possession; and that, if the Plaintiff should except to the further answer, and such answer be held insufficient, the Plaintiff should not take up the old process of contempt, but should commence a new process of contempt; and that the Defendant should consent to the hearing of the cause being advanced as soon as publication should have passed, and should,

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should, within a week, pay the costs of the several motions so ordered to be paid, and of this application.

No express notice was taken of the decree, and no order was made with respect to the costs of obtaining it; but the decree, which rested in minutes, although mentioned, was treated as rendered a nullity by the order now made.

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*Jan.* 30.
*Nov.* 15.

## SKEELES *v.* SHEARLY.

When an estate is limited to such uses as a purchaser shall appoint, and, subject thereto, to the usual uses to bar dower, an appointment made under the power will, in equity, as well as at law, overreach any judgments which may, in the mean time, have been entered up against the purchaser; and the circumstance that the appointee takes with notice of the judgments, will make no difference in this respect.

BY indentures of lease and release of the 17th and 18th of *December* 1819, a real estate, situate at *Bull's Cross*, in the parish of *Enfield*, in *Middlesex*, was conveyed to *William Cook*, his heirs and assigns, to hold to him, his heirs and assigns; but nevertheless to the use and behoof of such person or persons, for such estate or estates, either absolute or conditional, with or without power of revocation, and subject to, by, with, or under such other powers, provisoes, conditions, and declarations, and in such manner, in all respects, as *Cook*, by any deed or deeds, writing or writings, under his hand and seal, attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of or purporting to be his last will and testament, or any codicil thereto, to be by him signed, sealed, published, and delivered in the presence of, and attested by, three or more credible witnesses, should direct, limit, or appoint, convey, devise, or otherwise dispose of the same; and in default of, and in the mean time, and until such direction, limitation, or appointment, conveyance, devise, or other disposition, should be made, and in

in case any such should be made, then as to and concerning all such part or parts as should not be appointed or disposed of in or by such direction, limitation, or appointment, conveyance, devise, or other disposition, or pass by virtue thereof, to the use of *Cook* and his assigns during his natural life; with remainder to the use of *James Bacon*, his executors, administrators, and assigns, during the natural life of *Cook*, in trust for *Cook* and his assigns, and to be conveyed or disposed of as he or they should direct or appoint; with remainder to the use of *Cook*, his heirs and assigns, for ever.

In the month of *May* 1824, *Cordelia Skeeles* lent to *Cook* the sum of 1000*l.*; for the repayment of which sum, with interest, she took his bond, dated the 10th of *May* 1824. In the year 1828, the Plaintiff, *Sophia Ann Skeeles*, as the executrix of *Cordelia Skeeles*, brought an action, upon the bond, in the Court of King's Bench, and recovered a verdict and judgment against *Cook*, for the sum of 1230*l.*, for principal and interest. The judgment was duly entered and docketed, and was registered, at the *Middlesex* Registration Office, on the 22d of *July* 1828.

By indentures of lease and appointment and release, of the 17th and 19th of *July* 1830, it was witnessed that *Cook*, by force of the powers or authorities to him for that purpose given or limited by the indentures of the 17th and 18th of *December* 1819, did direct, limit, and appoint, convey, and otherwise dispose of the estate in question, to the use of the Defendant, *William Shearly*, his heirs and assigns, for ever; but subject to the provisoes thereinafter expressed; and it was also witnessed that *Cook* released and confirmed the same estate to

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*Shearly* and his heirs, to hold unto and to the use of *Shearly*, his heirs and assigns, for ever, but subject to the provisoes thereinafter expressed. The deed of appointment and release contained, amongst other things, a proviso for the reconveyance of the premises in question, and of other lands, upon payment by *Cook* to *Shearly* of the sum of 4500*l.* and interest; and a proviso that, in case of non-payment, *Shearly* might sell the premises; and, further, a proviso that it should not be lawful for *Cook*, his heirs, executors, administrators, or assigns at any time before *July* 1835, to oblige *Shearly*, his executors, administrators, or assigns, to receive the sum of 4500*l.*, or any part of it; and a proviso that in case that sum should not be paid at or before that time, then it should not be lawful for *Cook*, at any time before *July* 1840, to oblige *Shearly*, his executors, administrators, or assigns, to receive the amount, or any part of it. The sum of 3500*l.*, part of the sum of 4500*l.*, secured by the last-mentioned deeds, was the amount of a mortgage upon other lands, which had been previously made by *Cook* to other parties, and which was now transferred to *Shearly*.

In the month of *November* 1830, the Plaintiff sued out a writ of *elegit* upon her judgment; and on the 22d of *November* 1830, the sheriff of *Middlesex* extended a moiety of the estate in question, for the benefit of the Plaintiff, but did not deliver actual possession to her. The Plaintiff then brought an action of ejectment against the tenant in possession, for the purpose of recovering actual possession of the lands which had been extended. This ejectment was defended by *Shearly*, as landlord, who gave in evidence the deeds of the 17th and 19th of *July* 1830 at the trial; and thereupon, the Plaintiff was nonsuited.

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In the course of the year 1830, *Cook* left this country, and continued from thenceforward to reside abroad.

The present bill was filed on the 19th of *January* 1833, alleging that the Plaintiff had discovered that the Defendant, *Shearly*, at the date of the mortgage deeds of *July* 1830, had notice of the debt due to the Plaintiff, and of the judgment which she had recovered against *Cook*. The bill charged not only that *Shearly* had such notice, but also that it was understood between *Cook* and *Shearly* that the sum of 1000*l*., which was advanced by *Shearly*, in addition to the sum of 3500*l*., the amount of the previous mortgage, should be applied in payment of the debt due to the Plaintiff; and that, in fact, that sum of 1000*l*. was not paid over by *Shearly* to *Cook*, at or previously to the execution of the mortgage deeds of *July* 1830, but was retained by *Shearly* for the purpose of paying the Plaintiff's debt. The bill also charged that, in case it should appear that *Shearly* was entitled to any incumbrance prior to the Plaintiff's lien by virtue of her judgment, then the Plaintiff was entitled to redeem such prior incumbrance.

The prayer of the bill was, that it might be declared that the Plaintiff had, by virtue of her judgment, a lien or charge on the lands prior to any incumbrance vested in *Shearly*, and that he might be decreed to deliver up to the Plaintiff the possession of such part of the lands as had been extended, and might be restrained from setting up any legal estate to defeat the Plaintiff's title to recover in any action of ejectment; or, in case the Court should be of opinion that *Shearly* was entitled to any incumbrance, charge, or security prior to the Plaintiff's charge, then that it might be declared that the Plaintiff was entitled to redeem every such prior charge.

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The Defendant *Shearly*, by his answer, denied that, at the time at which the mortgage to him was executed, he had notice of the Plaintiff's debt, or of her bond, or action, or judgment, and stated that the sum of 4500*l.* was paid over by him (the Defendant) to *Cook*, for his general purposes, and for no others, previously to the execution of the mortgage. The fact of the mortgage being irredeemable before the year 1835 did not appear upon the pleadings.

There was some evidence on the part of the Plaintiff to shew that the Defendant *Shearly*'s solicitor had notice, at the time of the execution of the mortgage, of the Plaintiff's judgment; and that the 1000*l.* was retained by the solicitor to satisfy that judgment.

There was evidence, however, on the part of the Defendant *Shearly*, to shew that the 1000*l.* was paid by him to *Cook*.

The Vice-Chancellor having, at the hearing, dismissed the bill with costs (*a*), the Plaintiff now appealed.

Mr. *Wigram* and Mr. *Stuart*, in support of the appeal.

It is true that the case of *Doe dem. Wigan* v. *Jones* (*b*), has decided that, at law, the lien of a judgment creditor is defeated by the subsequent exercise of a power of appointment, created by a deed of a prior date to the judgment; and that that case has been adopted by the Vice-Chancellor in *Tunstall* v. *Trappes* (*c*), and *Eaton* v. *Sanxter*. (*d*) The principle upon which the case of *Doe*

(*a*) 8 *Sim.* 153.
(*b*) 10 *B. & C.* 459.
(*c*) 3 *Sim.* 286.
(*d*) 6 *Sim.* 517.

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*Doe dem. Wigan* v. *Jones* was decided was, that, by the power of appointment, the appointee takes as if his estate had been limited to him by the deed creating the power. This is, however, a mere arbitrary and anomalous technical decision at the common law, and, if followed out to its full extent, would produce the greatest injustice; for not only would it over-reach any judgment creditor who might even be in possession under an elegit, at the date of the appointment, but it would defeat all estates which the donee of the power might have created by conveyance; and yet it has long been firmly settled that all contracts and conveyances of the donee are good against subsequent appointees, upon the principle that a man shall not be allowed to derogate from his own grant, or make a fraudulent use of the rules or principles of law. On this ground a recovery would always let in prior estates, charges, or incumbrances, created by the tenant in tail; 5 *Cruise's Digest*, 432. 3d ed., 2 *Sugden on Powers*, 22. 25, 26. 37., *Goddard* v. *Complin* (*a*), *Beck* v. *Welsh* (*b*), *Capel's Case* (*c*), *Cholmley's Case* (*d*), *Doe dem. Mitchinson* v. *Carter* (*e*), *Shee* v. *Hale* (*g*), *Garth* v. *Ersfield.* (*h*) It will be said, however, that a judgment recovered against a debtor cannot be considered as the debtor's own act, and that therefore there is nothing inconsistent in allowing him to defeat it: but it is not true that a party is prevented from defeating his own acts only; for, in the case of a bankrupt who has an estate, subject to a power of appointment exerciseable by himself, the conveyance of the estate by the commissioners is not a voluntary act of

(*a*) 1 *C. in Ch.* 119.
(*b*) 1 *Wils.* 276.
(*c*) 1 *Rep.* 61 *b.*
(*d*) 2 *Rep.* 50 *a.*
(*e*) 8 *T. R.* 300.
(*g*) 13 *Ves.* 404.
(*h*) *Sir J. Bridgman's Rep.* 22.

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of the bankrupt, but yet it is one which he was never allowed to defeat; *Doe dem. Coleman* v. *Britain.* (*a*)

At all events, a party who, like the Defendant *Shearly*, takes under an appointment, with notice of a prior judgment — and any notice is sufficient — will be postponed to that judgment, upon the common principles of courts of equity; *Thomas* v. *Pledwell* (*b*), *Hine* v. *Dodd* (*c*), *Davis* v. *The Earl of Strathmore* (*d*), *Taylor* v. *Stibbert.* (*e*) A purchaser for value with notice is in no better situation than a voluntary purchaser or appointee, who would be a trustee for the creditors of the grantor or appointor.

The Plaintiff is entitled to redeem; for the Defendant has not stated, in his answer, that the mortgage deed contained a clause providing that the estate should not be redeemed till the year 1835; and if he had insisted upon that clause by his answer, it would be very doubtful whether a mortgagee was entitled by virtue of such a clause to enter into possession of the estate, and then to tell the mortgagor that he should not, for ten years, be at liberty to inquire whether, by receipt of rents and profits, the mortgage debt had not been satisfied.

*The* LORD CHANCELLOR expressed an opinion that the appeal could not be supported, and said that he would not trouble the counsel for the Respondent to argue in support of the decree, unless, upon looking into the cases referred to, his Lordship should think it necessary so to do.

Mr.

(*a*) 2 *B. & Ald.* 93.
(*b*) 7 *Vin. Ab.* 53. pl. 5.
(*c*) 2 *Atk.* 275.
(*d*) 16 *Ves.* 419.
(*e*) 2 *Ves.* jun. 437.

Mr. *Knight* and Mr. *Bazalgette* were to have supported the decree.

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*The* LORD CHANCELLOR.

*Nov.* 15.

In this case, the Plaintiff is a judgment creditor of *William Cook*, and as such claims as an incumbrancer upon the estate in question, as first incumbrancer; and, if not to be considered as first incumbrancer, then, as second incumbrancer, she claims to redeem a mortgage vested in *William Shearly*. The Plaintiff's judgment is of the date of the 22d of *July* 1828. In *November* 1830 she sued out an *elegit*, and the bill states that, having brought an ejectment to obtain possession, she was nonsuited upon production of *Shearly*'s mortgage, which was executed in *July* 1830.

The title of *William Cook* to the estate in question is under a conveyance of *December* 1819, by which the property was conveyed to him and his heirs, to the use of such persons, and for such estates, and in such manner as he should by deed or will appoint, and subject thereto, and in default thereof, to him in fee. This power he executed by deeds of *July* 1830, appointing the estate in question to the Defendant *William Shearly*, in fee, subject to redemption by himself upon repayment of 4500*l.*; of which 3500*l.* was a mortgage before charged upon other property, and 1000*l.* was then advanced by *Shearly*.

Two points were made by the bill: first, that the Plaintiff's judgment was a lien upon the property prior to *Shearly*'s: secondly, that *Shearly*, at the time of his mortgage, had notice of the Plaintiff's judgment; and that the 1000*l.* was to be advanced by him for the pur-

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pose of discharging the Plaintiff's debt; and that he did not pay it to the mortgagor, but retained it in order to pay the Plaintiff. Upon both these points I concur in opinion with the Vice-Chancellor, and think that the Plaintiff has no such title as she contends for.

It was not disputed that, at law, by the execution of the power, the estate limited in default of its being executed ceased and was defeated; and that the estates limited under the power took effect from the time of the execution of the power, in the same manner as if they had been contained in the deed creating the power, and, consequently, that the estate which *William Cook* had at the date of the judgment, and which was sought to be recovered in the ejectment, no longer existed; and that the effect of the *elegit* was therefore defeated, as in *Doe dem. Wigan* v. *Jones*. (*a*) But it was argued that this was not so in equity. No authority was cited for the distinction; but it was argued that it must be so, because a person claiming under the voluntary execution of a general power would hold the property, in equity, as assets of the appointor, for the benefit of his creditors; and that a purchaser for value, with notice, is in the same situation as a voluntary purchaser. It is the latter part of the proposition which fails, as that rule does not apply against a purchaser for valuable consideration, although taking under a voluntary appointee: *George* v. *Milbanke*. (*b*) It then was said that fines and recoveries operated to give effect to charges upon the tenant in tail; but the estate in this case sought to be affected by the charge is not the estate of the party from whom the charge is due, but the estate of a purchaser for value, and which estate never was the property of the debtor. The Plaintiff is merely a judg-

(*a*) 10 *B. & C.* 459. (*b*) 9 *Ves.* 190.

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a judgment creditor, without any lien by contract or other title than what her judgment gives her.

As to the second point, if the Plaintiff has no lien upon the estate created by the appointment, the alleged notice is immaterial; but it seems to have been supposed by the bill that a species of trust was created in the Plaintiff's favour as to the 1000*l.* For this there is no pretence; the Plaintiff was no party to the transaction, and the whole 4500*l.* is proved to have been paid by *Shearly*; 3500*l.* to the prior mortgagees, and 1000*l.* to the solicitor of *Cook*. It is quite immaterial whether it was the object of borrowing that sum that the Plaintiff's debt should be paid with it. There was nothing in the transaction to give her a lien upon the property, in preference to the mortgage of *Shearly*.

Assuming these points to be against the Plaintiff, still she is a judgment creditor, and as such, the bill seeks to redeem *Shearly*'s mortgage, the equity of redemption being now, under the appointment, vested, in fee, in *William Cook*: but this view of the case is met by the production of the Defendant *Shearly*'s mortgage deeds, by which it appears that his mortgage is not redeemable before *July* 1835, and the bill was filed in 1833. Every part, therefore, of the Plaintiff's case fails; and I entirely concur in the judgment of the Vice-Chancellor, in dismissing the bill with costs; to which must now be added the costs of this appeal.

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*Aug.* 9, 10, 11.

## KNATCHBULL *v.* FEARNHEAD.

The executors of a deceased trustee, having admitted the receipt of assets which would have been sufficient to answer a particular breach of trust committed by their testator, besides his other debts, held chargeable with the loss occasioned by such breach of trust, although they had paid all his debts of which they had any knowledge out of the assets, and had distributed the whole surplus among his residuary legatees many years before, and at a time when they had no notice of the breach of trust, or of any claim in respect of it.

THIS suit was instituted in the year 1833, by persons interested in a sum of 5000*l.*, which, in the year 1801, had been vested in *John Bradshaw* and *George Sayer*, upon certain trusts for the benefit of the children of the late Sir *Edward Knatchbull* by Dame *Mary Knatchbull* his wife. The object of the suit was to charge the personal representatives of the trustees, both of whom were dead, with the loss consequent on a breach of trust which they were alleged to have committed in paying over the trust fund to the late Sir *Edward Knatchbull*, who was entitled to a life interest in the fund, and by whom it had never been replaced.

The acts complained of as constituting the breach of trust took place in the years 1801 and 1804 respectively. The late Sir *Edward Knatchbull* died in the month of *September* 1819, leaving ten children by Dame *Mary*, his wife. Two of those children afterwards died under age: of the surviving eight, all of whom were parties to the suit, some as Plaintiffs and others as Defendants, several were still infants. *Sayer*, one of the trustees, died in the month of *May* 1814, leaving the Defendants *Catherine Sayer*, *Nicholas R. Toke*, and *Edward Cage* his executrix and executors, who duly proved his will. *Bradshaw*, the other trustee, died in the year 1823, and his will was proved by the Defendants *Fearnhead* and *Tipler*. (*a*)

The

(*a*) From the pleadings it appeared that *Bradshaw* died in the lifetime of *Sayer*; but this was admitted at the bar to be a mistake, and it was stated that *Bradshaw* died in the year above mentioned.

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The answer of the Defendants, the personal representatives of *Sayer*, among other things, stated, that their testator died in the year 1814; and that they had received assets of his estate sufficient to pay all his debts which had come to their knowledge, and also to answer the 5000*l.* in question, in case the Court should be of opinion that their testator's estate was liable for the same. It further stated, that the will of their testator, after giving divers specific and pecuniary legacies, bequeathed the residue of his personal estate to the Defendants, his executrix and executors, upon trust, to be divided among all his children, except his eldest son; and that they had paid all the legacies, and, many years ago (*a*), paid and divided the residue of the personal estate among the residuary legatees; and that they had not any fund out of which to answer any demand which might be established by the Plaintiffs against his estate. The same Defendants by their answer also stated, that they were wholly ignorant of the existence of any such trust as in the bill alleged until the year 1830.

By the Master's report, made in pursuance of the decree pronounced at the hearing of the cause, it was, among other things, found that a sum of 1612*l.* 16*s.*, (being part of the trust fund,) which in the year 1802 had been invested in the purchase of 2393*l.* 15*s.* 4*d.* 3 per cent. consols, in the joint names of *Sayer* and *Bradshaw*, had been afterwards sold out, under a power of attorney from them, on the 11th of *February* 1804; and that the produce of the sale, amounting to the sum of 1928*l.* 11*s.*, had been, by their authority, paid over on the

(*a*) This was the expression used in the answer; but it was admitted, on all hands, that the period referred to was anterior to the time at which the Defendants had notice of the breach of trust, or even of the existence of the trust itself.

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the same day to the account of Sir *Edward Knatchbull*, by whom it had been applied to his own use.

Certain exceptions taken to the Master's report by the Defendants, the representatives of *Sayer*, having been over-ruled, the cause came on to be heard at the Rolls, for further directions, on the 5th of *July* 1836; when an order was made, declaring, among other things, that the respective estates of *Sayer* and *Bradshaw* were liable to make good the sum of 2393*l.* 15*s.* 4*d.* 3 per cent. consols, together with the dividends which would have accrued thereon since the death of the late Sir *Edward Knatchbull;* and the Master was directed to ascertain what, at the market price on the 5th of *July* 1836, (being the day of the date of the order,) would be sufficient to have purchased the same amount of such stock, and to take an account of the dividends which would have accrued thereupon from the day of Sir *Edward Knatchbull*'s death; and it was declared that the Defendants, the personal representatives of *Sayer*, having admitted assets, were liable to make good such sum of stock, and the dividends in respect thereof; without prejudice however to any right which they might have, upon satisfying the claims of the Plaintiffs and of the Defendants in the same interest, to call upon the other Defendants, the executors of *Bradshaw*, for contribution.

A petition of appeal, presented by the personal representatives of *Sayer* against the original decree, and also against the order made on the exceptions and on further directions, having come on to be heard,

*The* LORD CHANCELLOR, after argument, dismissed so much of the appeal as related to the original decree, and to the order over-ruling the Appellants' exceptions. That part of the petition which appealed against the order

order on further directions was then brought on for discussion, when several points were raised and debated, which it is not material to report, as they referred exclusively to other sums, being portions of the trust fund which had never been invested in stock, and for the loss of which also the Appellants had been declared answerable. With respect to those sums, the Lord Chancellor varied the order, by directing a number of preliminary inquiries.

Sir *William Horne*, Mr. *Monro*, and Mr. *Purvis*, for the Appellants, then submitted, that, with respect to the sum of stock which the Master's report found to have been sold out by the trustees, and paid over, by their authority, to the late Sir *Edward Knatchbull*, it would be extremely hard and unjust that the representatives of *Sayer* should be made personally responsible for the act of their testator, when it appeared from their answer, and was not disputed, that they had been in total ignorance of the breach of trust complained of, and indeed of the existence of the trust itself, until after the lapse of sixteen years from the death of their testator, and of eleven years from the death of Sir *Edward Knatchbull;* and when, moreover, as they had sworn by that answer, they had, many years ago, in the regular discharge of their duty as executors, paid off all their testator's debts of which they had any knowledge, and distributed the surplus of his personal estate among his residuary legatees, and had not now a single shilling of his assets in their hands to answer the claim set up against them. If, under such circumstances, they were held personally liable, an executor could never safely administer his testator's estate, except under the indemnity afforded by a decree of the Court; and yet, if he insisted upon having recourse to that indemnity in a case where he had no notice of any doubtful

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doubtful or contingent claim to justify such a proceeding, he would do so at the risk of being saddled with the costs. For these reasons, it was impossible to hold that the Appellants had been guilty of any *devastavit* with which they ought to be charged in a court of equity: *Hawkins* v. *Day* (*a*), *The Governor and Company of Chelsea Water Works* v. *Cowper* (*b*), *Davis* v. *Blackwell.* (*c*)

*The* LORD CHANCELLOR said, that, where an executor passes his accounts in this Court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but, if he pays away the residue without passing his accounts in Court, he does it at his own risk. (*d*)

*The Solicitor-General*, and Mr. *Lovat*, *contrà*, were not called upon to argue the point.

(*a*) *Ambl.* 160.; and see App. 803. *Blunt's* ed.

(*b*) 1 *Esp.* 275.

(*c*) 9 *Bing.* 5.

(*d*) See *Norman* v. *Baldry*, 6 *Sim.* 621.; *Richards* v. *Browne*, 3 *Bingh. N. C.* 493.; *March* v. *Russell*, *suprà*, p. 31.; and *Ram on Assets*, ch. 41. s. 16.

## ELLICOMBE *v.* GOMPERTZ.

*Aug.* 3, 4.
*Nov.* 4.

Bequest of a residue upon trust for the testator's grandson, *B.*, the son of *Isaac*, at twenty-five, for life; and, after the death of *B.*, in case he shall have a son who shall attain twenty-one, then for such son of *B.*, who shall first attain twenty-one, absolutely; and in default of such son of *B.*, and after *B.*'s death, then upon trust for the testator's grandson, *J.*, the son of *Isaac*, at twenty-five, for life; and after the death of *J.*, in case he shall have a son who shall attain twenty-one, then to such son of *J.* who shall first attain twenty-one, absolutely; with the like limitations successively in favour of any other grandsons, sons of *Isaac*, born in the testator's life-time, and their respective sons first attaining twenty-one; and in default of a son of any such grandson attaining twenty-one, then upon trust for any son of *Isaac*, born after the testator's decease, who shall first attain twenty-one, absolutely; and in case no son of any son of the testator's son *Isaac*, then born, or thereafter to be born in the testator's life-time, nor any son of his son *Isaac*, born after his decease, shall live to attain twenty-one, then from and immediately after the decease of all the sons and grandsons of his son *Isaac*, upon trust for the testator's nephew, *G.*, for life; and upon the decease of his nephew, *G.*, in case he shall have a son who shall live to the age of twenty-one, then upon trust for such son who shall first attain twenty-one, absolutely.

Held, upon the whole context of the will, that the words "after the decease of all the sons and grandsons," must be read as if they had been "after the decease of all the *aforesaid*," or "all *such* sons and grandsons;" and that the limitation over in favour of the first son of *G.* attaining twenty-one, was therefore not too remote.

*HENRY ISAAC*, by his will dated the 6th of *August* 1771, which was duly executed and attested to pass freehold estates by devise, gave and devised all his freehold and copyhold hereditaments, except his house in *Magpie Alley*, *London*, and his estates in the parish of *Walthamstow*, to *Joseph Martin*, *Ebenezer Blackwell*, and *Joseph Gompertz*, and their heirs, to the use of his son *Isaac Isaac*, for life, with remainder to the use of trustees to preserve contingent remainders; remainder to the use of the first son of the body of *Isaac Isaac*, and his heirs male; with similar remainders to the use of the second and other sons of the said *Isaac Isaac*, and the heirs male of their respective bodies; remainder to the use of his (the testator's) nephew, the said *Joseph Gompertz*, his heirs and assigns for ever. The testator also devised his house in *Magpie Alley*, together with the furniture therein, to the same trustees, upon trust to permit his said son *Isaac Isaac* during

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during his life, and after his decease, his (the testator's) son, *Hyam Isaac*, during his life, to possess and enjoy the same; and after the decease of the survivor of his said sons, then upon trust to convey and assign the house and premises to his nephew, the said *Joseph Gompertz*, to his own absolute use in fee. He directed that all reserved rents, and all charges and demands payable out of or chargeable on the same during the lives of his sons, *Isaac Isaac* and *Hyam Isaac*, should be paid by his trustees from time to time out of the residuum of his estate, or the income thereof, except the land tax.

And as to his house, garden, and lands at *Walthamstow*, and all other his estates in that parish, the testator gave, devised, and bequeathed the same unto the said trustees, their heirs, executors, administrators, and assigns respectively, upon trust to sell and dispose thereof respectively for the best price. And he also directed that his pictures, bronzes, and prints, should be sold by his said trustees; and that the proceeds of such sales of his estates at *Walthamstow*, and of his pictures, bronzes, and prints, and also the said premises, till sold, should be considered as part of the residuum of his personal estate, and be subject to the trusts and purposes thereinafter by him directed concerning such residuum.

All the residue and remainder of his personal estate, of what nature or kind soever, he bequeathed unto the said *Joseph Martin*, *Ebenezer Blackwell*, and *Joseph Gompertz*, whom he appointed the joint executors of his will, and to their executors, administrators, and assigns, upon trust, as soon as conveniently might be after his decease, to pay thereout all his debts and funeral expenses, and upon further trust to pay and satisfy a great number of pecuniary legacies and annuities to the different persons and charitable objects therein

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therein specified, and among others the following; to his son *Hyam* a legacy of 300*l.*, and to his son *Isaac* a legacy of 500*l.*; a sum of 2000*l.* to be applied by his trustees towards paying off and compounding all the just debts which *Hyam* might owe at his (the testator's) decease, his intention being that *Hyam* might be set clear in the world; to *Hyam*, for his maintenance and support during his life, an annuity of 400*l.* to be paid into his own hands, or to his order, by monthly payments; to *Isaac*, during his life, an annuity of 1100*l.* by half-yearly payments; to the wife of *Isaac*, after her husband's decease, and during her widowhood, an annuity of 500*l.* for the support and maintenance of herself and her children, and if she should marry again, then for the maintenance and education of the children until they should attain twenty-five; to each of the sons of *Isaac* who should be living at the testator's decease 2000*l.*, on their respectively attaining the age of twenty-five; and to each of the daughters of *Isaac* the like sum of 2000*l.* at twenty-one or marriage.

The will then proceeded as follows: — "And as for and concerning such part of the said residuum of my personal estate as my said executors and trustees shall not deem necessary to appropriate and set apart to answer the several trusts and purposes aforesaid; and also all such part of my said personal estate as shall be so appropriated and set apart, when and as the respective trusts hereby declared concerning the same shall cease, determine, or be performed; and also all the annual interest, dividends, profits, and produce of my said personal estate which shall be set apart and appropriated as aforesaid, over and above what will be sufficient to make good, answer, and pay the several and respective payments hereinbefore charged thereupon, and made payable thereout, I hereby will and direct that my said

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executors shall from time to time lay out and invest the same, and also all the annual interest, dividends, profits, and produce from time to time to arise, be had, made, and received in respect thereof, in some one or more of the public funds, to accumulate until my grandson *Benjamin Isaac*, the eldest son of my said son *Isaac Isaac*, shall have attained his age of twenty-five years; and from and immediately after my said grandson *Benjamin Isaac* shall have attained his age of twenty-five years, then my said trustees shall, and I do hereby so direct, from time to time pay unto my said grandson *Benjamin Isaac*, for and during the term of his natural life, the whole interest, dividends, and income of the said residuum of my personal estate not before disposed of, and of all the increase, accumulations, and improvements thereof from time to time happened and happening, to and for his own proper use and benefit. And from and after the decease of my said grandson *Benjamin Isaac*, in case he shall have a son who shall live to attain the age of twenty-one years, then I do hereby order and direct, that my said trustees shall pay and transfer unto the son of my said grandson *Benjamin Isaac*, who shall first attain the age of twenty-one years, and his executors, administrators, and assigns, all the residuum of my personal estate, and all the increase, accumulations, and improvements thereof, and additions thereto, in any manner and by any means or accident whatsoever, to and for his and their own proper use and benefit; subject, however, to and chargeable with the several trusts and payments by this my will created, reposed in, and directed to be paid by my said trustees and executors, or such of them as shall be then existing unperformed and unpaid, and in such manner as my said trustees and executors shall think proper for securing the due performance thereof. And I do hereby authorise and desire my said trustees to use and apply, from

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from time to time, so much and such part of the dividends, interest, and profits of the said residuum of my said personal estate, as they shall think fit, for and towards the maintenance and education of the son of my said grandson *Benjamin Isaac*, who, for the time being, shall be the son next entitled in contingency to the said whole residuum of my said personal estate, until he shall attain his said age of twenty-one years. And in case my said grandson, *Benjamin Isaac*, shall have no son who shall live to attain the age of twenty-one years, then and in such case, from and after the death of my said grandson *Benjamin Isaac* without having a son who shall live to attain the age of twenty-one years, I do hereby will and direct my said trustees, from time to time, to pay and apply all the dividends, interest, and profits of the said residuum of my said personal estate, and of all the increase, accumulations, and improvements thereof, and additions thereto, in anywise whatsoever, unto my grandson *Joseph Isaac*, at the age of twenty-five years, for and during the term of his natural life, to and for his own use and benefit; and from and after the decease of my said grandson *Joseph Isaac*, in case he shall have a son who shall live to attain the age of twenty-one years, then I do hereby order and direct my said trustees to pay and transfer unto the son of my said grandson *Joseph Isaac* who shall first attain the age of twenty-one years, and his executors, administrators, and assigns, all the said residuum of my said personal estate, and all the interest, accumulations, and improvements thereof, and additions thereto, in any manner and by any means or accident whatsoever, to and for his and their own proper use and benefit; subject, however, to and chargeable with the several trusts and engagements by this my will created, reposed in, and directed to be paid by my said trustees and executors, or such of them as shall be then existing un-

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performed and unpaid, and in such manner as my said trustees and executors shall think proper for securing the due performance thereof. And I do hereby authorise and desire my said trustees to use and apply, from time to time, so much and such part of the dividends, interest, and profits of the said residuum of my said personal estate as they shall think fit, for and towards the maintenance and education of the son of my said grandson *Joseph Isaac*, who, for the time being, shall be the son next entitled in contingency to the said whole residuum of my said personal estate, until such son attain the age of twenty-one years. And in case my grandson *Joseph Isaac* shall have no son who shall live to attain the age of twenty-one years, I do hereby will and direct my said trustees to pay the interest, dividends, and profits of the said residuum of my said personal estate, and of all the increase, accumulations, and improvements thereof, and additions thereto, in any ways whatsoever, unto every such other son of my said son *Isaac Isaac*, now born or hereafter to be born in my lifetime, as shall, for the time being, be the eldest son and heir male of the body of my said son *Isaac Isaac*, at his age of twenty-five years, for and during the term of his natural life, to and for his own proper use and benefit. And in case any such other son of my said son *Isaac Isaac*, now born or hereafter to be born in my lifetime, and who, for the time being, shall be his eldest son and the heir male of his body, shall have a son who shall live to attain the age of twenty-one years, then my said trustees shall, from and after the decease of every such other son of my said son *Isaac Isaac*, pay and transfer unto the son of every such other eldest son and heir male of the body of my said son *Isaac Isaac*, who shall first attain the age of twenty-one years, and his executors, administrators, and assigns, all the said residuum of my said personal estate, and all the interest, and

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and accumulations, and improvements thereof, and the additions thereto, in any manner and by any means or accident whatsoever, to and for his and their own proper use and benefit; subject, however, to and chargeable with the several trusts and payments by this my will created, reposed in, and directed to be paid by my said trustees and executors, or such of them as shall be then existing unperformed and unpaid, and in such manner as my said trustees and executors shall think proper for securing the due performance thereof. And I do hereby authorise my said trustees to use and apply, from time to time, so much and such part of the dividends, interest, and profits of the said residuum of my said personal estate, as they shall think fit, for and towards the maintenance and education of the son of every such other eldest son and heir male of the body of my said son *Isaac Isaac*, who, for the time being, shall be the son next entitled in contingency to the said whole residuum of my said personal estate, until he shall attain the said age of twenty-one years.

"And in case no son of my said son *Isaac Isaac*, now born or hereafter to be born in my lifetime, shall have a son who shall live to attain the age of twenty-one years, and my said son *Isaac Isaac* shall have a son, born after my decease, who shall live to attain twenty-one years, then my said trustees shall pay and transfer unto the son of my said son *Isaac Isaac* born after my decease, who shall first attain the age of twenty-one years, and his executors, administrators, and assigns, all the said residuum of my said personal estate, and all the interest, accumulations, and improvements thereof, and the additions thereto, in any manner and by any means and accident whatsoever, to and for his and their own proper use and benefit; subject, however, to and chargeable with the several trusts and payments by this my will created, re-

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posed in, and directed to be paid by my said trustees and executors, or such of them as shall be then existing unperformed and unpaid, and in such manner as my said trustees and executors shall think proper for securing the due performance thereof. And I do hereby authorise my said trustees to raise and apply, from time to time, so much and such part of the dividends, interest, and profits of the said residuum of my said personal estate as they shall think fit, for and towards the maintenance and education of the son of my said son *Isaac Isaac* born after my decease, who, for the time being, shall be the son next entitled in contingency to the said whole residuum of my said personal estate, until he shall attain the said age of twenty-one years.

"And in case no son of any son of my said son *Isaac Isaac*, now born or hereafter to be born in my lifetime, nor any son of my said son *Isaac Isaac* born after my decease shall live to attain the age of twenty-one years, *then from and immediately after the decease of all the sons and grandsons of my said son Isaac Isaac*, I do hereby will, order, and direct that my said trustees shall and do, from time to time, pay the interest, dividends, and profits of the said residuum of my personal estate, and of all the increase, accumulations, and improvements thereof, and additions by any means thereto, unto my said nephew *Joseph Gompertz*, for and during the term of his natural life, to and for his own use and benefit. And upon and immediately after the decease of my said nephew *Joseph Gompertz*, in case he shall have a son who shall live to the age of twenty-one years, then I do hereby will, order, and direct that my said trustees shall pay, assign, and transfer over all the said residuum of my said personal estate, and all the increase, accumulations, and improvements thereof, and additions thereto then already made, and which may afterwards arise and happen,

happen, unto such son of my said nephew *Joseph Gompertz* as shall first attain the age of twenty-one years, and to his executors, administrators, and assigns, to and for his and their own proper use and benefit; subject, however, to and chargeable with the several trusts and payments by this my will created, reposed in, and directed to be paid by my said trustees and executors, or such of them as shall be then existing unperformed and unpaid, and in such manner as my said trustees and executors shall think proper for securing the due performance thereof. And I do hereby authorise my said trustees to use and apply, from time to time, so much and such part of the dividends, interest, and profits of the said residuum of my said personal estate, as they shall think fit, for and towards the maintenance and education of such son of my said nephew *Joseph Gompertz*, as for the time being shall be the son next entitled in contingency to the said whole residuum of my said personal estate, until such son attains the age of twenty-one years. And in case the said *Joseph Gompertz* shall have no son who shall live to attain the age of twenty-one years, then from and after the decease of my said nephew, I do will, order, and direct that my said trustees shall and do pay, divide, transfer, and assign over all the said residuum of my personal estate, and all the increase, accumulations, and improvements thereof, and additions thereto, already had, made, and accrued, and which shall afterwards happen and fall in thereto, unto, between, and amongst all and every of my then next of kin, according to the statute of distributions of intestates' estates, to and for his and their own proper use and benefit respectively; subject, however, and chargeable to and with the several trusts and payments by this my will created, reposed in, and directed to be paid by my said trustees and executors, or such of them as shall be then existing unperformed and unpaid,

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and in such manner as my said trustees and executors shall think proper for securing the due performance thereof.

"And I do hereby further direct that all the dividends, interest, profits, produce and increase to be had, made, or arise from the said residuum of my said personal estate, and the accumulations thereof, during the time or times that any of the sons of my said son *Isaac Isaac*, now born or hereafter to be born during my lifetime, and entitled to take under this my will, shall be under the age of twenty-five years, or during the time or times that any son of my said son *Isaac Isaac*, to be born after my decease, or any grandson of my said son *Isaac Isaac*, or any son of my said nephew *Joseph Gompertz*, entitled to take under this my will, shall be under the age of twenty-one years, over and above what shall be from time to time advanced by my said trustees for the maintenance and education of any grandson or son of my said son *Isaac Isaac*, or any son of my said nephew as aforesaid, shall be from time to time laid out and accumulate, and be deemed and taken as part of the residuum of my personal estate, and from time to time go and be applied and disposed of as the said residuum is ordered and directed by this my will."

By a codicil, dated the 21st of *November* 1772, reciting (as was the fact), that his son *Hyam Isaac* was then recently dead, the testator revoked all the devises and bequests in his favour, and he also made several other alterations with respect to the pecuniary legacies given by the will: but neither that, nor a second codicil which was executed a few months afterwards, in any manner attempted to vary or affect the limitations in the will disposing of the residuary estate.

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The testator died in the year 1773, leaving one son, *Isaac Isaac*, his heir at law, and sole next of kin. At the time of the testator's death, *Isaac Isaac* had six children living; three sons, namely, *Benjamin*, *Joseph*, and *Henry*, and three daughters. *Joseph Gompertz*, the devisee named in the will, died some time after the testator, leaving *Lyon Gompertz* his eldest son, who long since attained the age of twenty-one. *Isaac Isaac* died intestate, in the year 1803, leaving his three sons, and two of his daughters, surviving him. The sons all lived to attain the age of twenty-five, but none of them had any male issue. *Benjamin*, the eldest and the last survivor of the sons, enjoyed the interest and dividends of the testator's residuary estate during his life, and died in the year 1829.

The present bill was filed by one of the daughters of *Isaac Isaac* (together with her husband), claiming a share in the testator's residuary estate, as sole surviving next of kin, and as personal representative of certain deceased next of kin, of *Isaac Isaac*, against *Lyon Gompertz* and other parties. It alleged that the limitation over in favour of the first son of *Joseph Gompertz* who should attain the age of twenty-one years, after the limitations to the sons and grandsons of the testator, was void; that, in the events which had happened, the testator had died intestate as to his residuary estate; and that such estate, therefore, devolved to his son *Isaac Isaac*, as his sole next of kin. The bill prayed a declaration accordingly.

The Defendant *Lyon Gompertz* put in a general demurrer to the bill, for want of equity.

Mr. *Wigram* and Mr. *Richards*, in support of the demurrer.

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Even upon the strict construction of the words, the limitation over is not too remote. The bequest to the eldest son of *Joseph Gompertz*, failing all the sons and grandsons of *Isaac Isaac*, must be construed with reference to the antecedent gift, which was to a limited class of sons and grandsons only; those, namely, who were designated as persons to take by virtue of the prior limitations. In this view, the word "the" is equivalent to "those;" that is to say — the sons and grandsons who had been previously described. Any other construction would be attended with this absurdity, that it would capriciously postpone the interest to be taken by the *Gompertz* family, to a period not depending for its commencement upon the failure of that class of persons who were avowedly the primary objects of the testator's bounty, but upon the failure of certain other persons to whom the will gives no benefit whatever. Such an intention on the part of the testator would be, in the highest degree, unnatural and improbable. These considerations are strengthened by the peculiar language of the clause containing the gift over, the whole of which forms one connected sentence, coupled by the word "then." "In case no son of any son of my said son *Isaac Isaac*, now born or hereafter to be born in my lifetime, nor any son of my said son *Isaac Isaac*, born after my decease, shall live to attain the age of twenty-one years, *then from and immediately after* the decease of all the sons and grandsons," &c. the gift over is to take effect. Here, the word "then" is equivalent to "upon that contingency," and the two classes of persons designated — the one, sons and grandsons who are to take, and the other, sons and grandsons upon whose failure *Gompertz* and his family are to take — are brought so directly into juxta-position, that it is impossible not to believe that they were meant to be co-relative and identical. Indeed, the interposed words "from and immediately after the decease

decease of all the sons and grandsons," &c. are mere surplusage and repetition, thrown in by the conveyancer as a concise and comprehensive, though, in truth, an inaccurate, description of the several classes of sons and grandsons just before enumerated, and upon failure of whom the limitation over was to arise. They might, therefore, be expunged without at all affecting what is the obvious sense of the clause.

Supposing the grammatical construction, however, to be against the Defendant, still, upon the whole will taken together, the meaning of the testator is placed beyond doubt. If the bequest to the *Gompertz* family was to be postponed until after the death of all grandsons of *Isaac Isaac*, —the issue of his daughters as well as of his sons, and of sons born after, as well as before the testator's death, — inasmuch as many of such grandsons could themselves take nothing, there might be a time when there would be no party *in esse* capable of taking, and during which nothing could be done with the testator's property. What was to become of the interest and accumulations during the intermediate period between the death of a grandson who was, and of other grandsons who were not, the objects of the testator's bounty? To suppose that the testator intended the intermediate interest to lapse, in such an event, would be to impute an intention of partial intestacy, against which the Court always leans. The clause directing accumulation also strongly corroborates the same view of the case; for it raises an irresistible inference, that those persons, and no others, were to take an interest in the fund, for whose minorities a provision is made out of the accruing income of the residue; and that they were to take in immediate succession to each other. Upon the whole context of the will, therefore, the general and indefinite language descriptive of the class upon whose default the limitation

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limitation over is made contingent, must be read in a restricted sense by reference to the terms of the preceding gift; *Morse* v. *Lord Ormonde* (*a*), *Trickey* v. *Trickey*. (*b*) Many authorities shew that, if the sense requires it, the Court will supply words in order to carry out more effectually what is plainly the general intent; *Target* v. *Gaunt* (*c*), *Blackborn* v. *Edgley* (*d*), *Ginger* v. *White* (*e*), *Egerton* v. *Jones*. (*g*) If necessary, therefore, the Court will read the clause specifying the contingency, viz. on failure of all the grandsons, as if it were "all the said," or "all such," grandsons. In *Morse* v. *Lord Ormonde*, the Court went much further than it is now asked to do, for the purpose of supporting the validity of the ulterior limitations.

Mr. *Jacob*, Mr. *Hodgson*, and Mr. *James Russell*, for the Plaintiffs.

In conformity with the settled rule of law, the Court is bound to hold the limitation to the first son of *Joseph Gompertz* attaining twenty-one, to be void for remoteness. That limitation is made to depend in terms upon the deaths of all the grandsons of *Isaac Isaac* — including the male issue of his sons, as well born as to be born, and the male issue of daughters as well as of sons — that is to say, upon the failure of lives which had not, or might not have come into *esse* at the time of the testator's decease; *Leake* v. *Robinson*. (*h*) To the Plaintiffs, it is immaterial whether grandsons not specially designated in the will are to be considered as taking an estate by implication, as in *Langley* v. *Baldwin*,

(*a*) 5 *Mad.* 99.; and 1 *Russ.* 382.
(*b*) 5 *Mylne & Keen*, 560.
(*c*) 1 *P. Wms.* 432.
(*d*) 1 *P. Wms.* 600.
(*e*) *Willes*, 348.
(*g*) 5 *Sim.* 409.
(*h*) 2 *Mer.* 363.

*win* (*a*), and *Attorney-General* v. *Sutton* (*b*); or whether, as in *Andree* v. *Ward* (*c*), although they are held to take no interest themselves, the gift over to the first son of *Joseph Gompertz* attaining twenty-one is postponed until they shall have all ceased to exist. The will contains no express bequest to all the grandsons; but the gift over to the *Gompertz* family is limited on the failure of all the grandsons, a species of conditional limitation which is neither singular nor unnatural. The words, therefore, so far from being surplusage, lead to a very natural exposition of the testator's meaning. What can be more common, both in settlements and wills, than that, after a gift to the parents, the operation of the clause containing the limitation over should be made to depend upon the non-existence of issue, although no gift is made to the issue directly and in terms? So, in this case, those grandsons who might be born of the unborn sons of *Isaac Isaac*, though they took nothing directly as *personæ designatæ*, might still be held or intended to take some interest by implication; or, possibly, the intention might be to let in all the grandsons of *Isaac*, other than those specified, in case any others should come into *esse*, to take the residue among them as the testator's next of kin.

Be that, however, as it may, the words of this will are clear, and admit of no mistake. The distinction suggested between "all grandsons," and the words occurring here, "all *the* grandsons," is frivolous and unfounded. According to the plain grammatical construction of the passage, the interest given to the first son of *Joseph Gompertz* attaining twenty-one was not to arise until after the failure of all the sons and grandsons of

(*a*) 1 *Eq. Ab.* 185.; and 1 *Ves. sen.* 26.

(*b*) 1 *P. Wms.* 754.

(*c*) 1 *Russ.* 260.

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of *Isaac Isaac.* The Defendant, *Lyon Gompertz*, in order to support his title, proposes to strike out the word "all," and to substitute for it the word "such" or "said," or some other equivalent expression, before the words "sons and grandsons;" but the will, as it stands, is perfectly intelligible and sensible, and such an alteration, so far from being called for by the manifest intent, would totally change the meaning and effect of the sentence. To take such a liberty with the text, would be, in effect, to make a new will for the testator. The clause consists of two distinct branches; one referring to a particular and limited portion of the class of sons and grandsons, the other comprehending the whole class generally: but, if the Defendant's argument prevails, the latter part of the clause is a mere idle repetition of the former. For what purpose were the two branches of the clause expressed in different terms, unless the testator intended to employ them in contradistinction and contrast to each other? The will is skilfully and technically drawn, and from the language of the limitation over, in the event of the grandson *Benjamin* dying without having a son who attained twenty-one, in favour of *Joseph* and his first son attaining twenty-one, it is obvious that the testator knew well how to limit a gift over so as to take effect immediately; and if that had been his purpose with respect to the *Gompertz* family, he would have adopted a similar form of expression. The clause of accumulation carries the case no further than the clause of gift, since it merely provides for the minority of those who are designated as persons to take, and the testator, whatever he might intend, could not make such a provision for persons, who, in the contemplation of law, were too remote. All the cases referred to turn on the use of the word "issue," a word of equivocal and very flexible import; but no authority has been or can be produced for

for holding that the words "all the sons and grandsons" can be cut down by reference or implication, so as to mean some only of the individuals answering that description. Here are no words of limitation to issue generally, as a class, the extent of which is to be explained and defined by the mode in which the term has been previously used. That was the principle on which the Court proceeded in deciding *Morse* v. *Lord Ormonde* (*a*), *Malcolm* v. *Taylor* (*b*), and *Trickey* v. *Trickey* (*c*), but it has no application in the present instance. The reasoning and the judgment of Sir *John Leach* in *Bristow* v. *Boothby* (*d*), a judgment which was affirmed by Lord *Lyndhurst* on appeal, applies directly to the present question, and is an important authority in the Plaintiffs' favour.

The following cases were also cited for the Plaintiffs; *Salkeld* v. *Vernon* (*e*), *Baldwin* v. *Karver* (*g*), *Doe* v. *Lyde* (*h*), *Doe* v. *Perrin.* (*i*)

Mr. *Wigram*, in reply.

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*The* LORD CHANCELLOR. *Nov.* 4.

The question raised by this demurrer is, whether the gift of the residue in the will of *Henry Isaac* be void, as too remote.

It appears that at the time of making the will the testator had two sons, *Hyam Isaac* and *Isaac Isaac*; and that

(*a*) 5 *Mad.* 99.; and 1 *Russ.* 582.
(*b*) 2 *Russ. & Mylne*, 416.
(*c*) 3 *Mylne & Keen*, 560.
(*d*) 2 *S. & S.* 465.
(*e*) 1 *Eden*, 64.
(*g*) *Cowp.* 309.
(*h*) 1 *T. R.* 593.
(*i*) 3 *T. R.* 484.

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that this *Isaac Isaac* had two sons, *Benjamin* and *Joseph Isaac;* and that the testator had also a nephew, *Joseph Gompertz*, the son of a sister and the father of the Defendant. *Hyam*, the testator's eldest son, appears from the will to have been guilty, in the opinion of the testator, of extravagance. The testator, by his will, devised all his freehold and copyhold estate, except some premises in *London*, and an estate at *Walthamstow*, to the use of *Isaac Isaac*, his son, for life; remainder to his first and other sons in tail male; remainder to his nephew, *Joseph Gompertz*, in fee, — passing over all children of *Hyam* and all issue female of *Isaac Isaac*. The premises in *London*, with the furniture and effects therein, he devised and bequeathed to trustees, in trust for *Isaac Isaac*, for life; remainder to *Hyam*, for life; remainder to his nephew, *Joseph Gompertz*, absolutely — thus preferring him to any issue of either of his sons.

The estate at *Walthamstow* he directed should be sold, and the proceeds applied as the residue of his personal estate.

The residue of his personal estate he gave to trustees, upon trust to pay his debts and legacies, in which were included a legacy of 300*l.* to *Hyam;* and to *Isaac Isaac* a legacy of 500*l.*, and 2000*l.* in payment of *Hyam*'s debts, and to *Hyam* himself 400*l.* per annum, in monthly payments, for his subsistence; to *Isaac Isaac* the yearly sum of 1100*l.*, and to his wife surviving 500*l.* per annum, for the support of herself and his children till twenty-five; to the sons of *Isaac Isaac*, living at the testator's death, 2000*l.* each at twenty-five; and to his daughters 2000*l.* each at twenty-one, or marriage. He also gave other annuities for life, and directed that the residue of his personal estate should be invested in the public funds; and that the dividends should be laid out to

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to accumulate until his grandson, *Benjamin Isaac*, the eldest son of his son *Isaac Isaac*, should have attained twenty-five; and after that time, that his trustees should pay the interest of his residuary estate and of the accumulations to his said grandson for life; and, after his death, to pay the principal to such son of his said grandson *Benjamin* as should first attain twenty-one, with maintenance in the meantime for such expectant son of his grandson.

If his grandson *Benjamin* should have no son who should attain twenty-one, then there was a similar direction to pay the dividends to his grandson *Joseph Isaac*, from his age of twenty-five, for life; and after his death, to pay the principal to such son of his said grandson *Joseph*, as should first attain twenty-one, with maintenance for such expectant son of *Joseph*. And if *Joseph* should have no son who should attain twenty-one, then a precisely similar provision was made for any other son of the testator's son *Isaac Isaac*, who might be born in the testator's lifetime, who should, for the time, be the eldest son of *Isaac Isaac*, for life, from twenty-five, with remainder to such eldest son of such other son of *Isaac Isaac* as should first attain twenty-one. And in case no son of such other son of *Isaac Isaac*, so born in the testator's lifetime, should attain twenty-one, then the trustees were to pay and transfer the residue to such son of the testator's son *Isaac Isaac*, born after the testator's death, as should first attain twenty-one, with maintenance in the meantime for such expectant son of *Isaac Isaac*, born after the testator's death.

Then follow the words upon which the question turns: "And in case no son of any son of my said son *Isaac Isaac*, now born, or hereafter to be born in my lifetime, nor any son of my said son *Isaac Isaac*, born after

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my decease, shall live to attain the age of twenty-one years, then, from and immediately after the decease of all the sons and grandsons of my said son *Isaac Isaac*, I do hereby will, order, and direct, that my said trustees shall and do," &c. He then directs the income to be paid to his nephew *Joseph Gompertz*, for his life, and after his death, the principal to be paid to such son of the said *Joseph Gompertz* as should first attain twenty-one. And in case *Joseph Gompertz* should have no son who should live to attain twenty-one, he directed the principal of the residue and the accumulations to be paid to his (the testator's) next of kin. And he directed that all the dividends and interest which should arise from such residue, and the accumulations thereof, "during the time or times that any of the sons of my said son *Isaac Isaac*, now born, or hereafter to be born, during my lifetime, and entitled to take under this my will, shall be under the age of twenty-five years, or during the time or times that any son of my said son *Isaac Isaac*, to be born after my decease, or any grandson of my said son *Isaac Isaac*, or any son of my said nephew *Joseph Gompertz*, entitled to take under this my will, shall be under the age of twenty-one years, over and above what shall be, from time to time, advanced by my said trustees for the maintenance and education of any grandson or son of my said son *Isaac Isaac*, or any son of my said nephew, as aforesaid, shall be from time to time laid out and accumulate and be deemed and taken as part of the residuum," &c.

The testator's son, *Hyam*, having died, he by a codicil revoked the provision made for him, and made other alterations in the legacies and annuities given by his will; but nothing in this or the other codicil seems to bear upon the question made upon the gift of the residue by the will.

It

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It is obvious, from the provisions of the will, that the author of the will knew well to what extent the law would permit the vesting of the residue to be postponed, and intended to keep within those limits.

For this purpose the testator, having a son, *Isaac Isaac*, and two grandsons, sons of that son, after providing for the subsistence of the father, *Isaac Isaac*, gives to the sons life estates, to commence at twenty-five years of age, and gives the principal to such of those sons' sons as shall first attain twenty-one. Considering, also, that this *Isaac Isaac* might have other sons born in the testator's lifetime, for whom and for whose sons he might by law make similar provisions, he provides for sons, who might be born in his own lifetime, and for their sons, in the same manner: but he also contemplated the possibility that *Isaac Isaac* might have sons born after his (the testator's) death, and knowing that he could not make a similar provision for such sons, he directs that, upon failure of the prior gifts, the property should vest in such of such sons as should first attain twenty-one.

The object in this arrangement appears to have been, first, to keep the property together; there being no provision for any younger sons, or for any daughters of *Benjamin* or *Joseph*, or of any other sons of *Isaac Isaac*, born in his own lifetime, or for any children of *Isaac Isaac*, born after the testator's death, except such son as should first attain twenty-one; and secondly, to postpone the vesting as long as the rules of law would admit, but carefully to keep within them.

It is said, however, that the gift over, under which the Defendant claims, is only to take effect after the decease of *all* the sons and grandsons of *Isaac Isaac*;

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and that such limitation is too remote, and therefore void. Undoubtedly, if these words are to be construed literally, it would be too remote. But the first consideration is, can they, consistently with the prior gift, be construed literally? Of all the grandsons of *Isaac*, who might come into *esse*, the testator provided only for one, who, to become entitled, must have attained twenty-one, and be born of a father himself born in the testator's lifetime. But the testator's son, *Isaac Isaac*, might have had sons, born after the testator's death, who might have died under twenty-one, leaving sons; and as *Isaac Isaac* had three daughters, there was every probability that he might have grandsons, the sons of such daughters. For such grandchildren, however, no provision is, in any event, made; and yet, if the words are to be construed literally, the provision for *Joseph Gompertz* and his son is not to take place until after the death of all such grandchildren of *Isaac Isaac*, although all the objects of the testator's care had failed.

To account for this, it was suggested, that this might have been purposely done, by permitting the property to pass to such grandchildren as next of kin. If the testator had had any such object in contemplation, he might have provided for it. Why could he not provide for the children of a son of *Isaac Isaac*, born after his own death, in the event of such son himself dying under twenty-one; and why could he not provide for the children of daughters of *Isaac Isaac*, as he did provide for sons of his sons? Such an intention would, in fact, be inconsistent with the whole scheme of his testamentary dispositions, and with the intention manifest from all its provisions.

That the author of the will knew the rule of law is manifest. To construe these words literally would imply

ply an intention to violate it, and thereby to defeat the declared intention of benefiting *Joseph Gompertz* and his son.

It is said, however, that the testator did intend the gift to *Joseph Gompertz* to take place, but that the vesting of it was purposely postponed until after the death of all the grandsons of *Isaac Isaac*.

This of course assumes an intention, that the gift should take effect, and that it should be so postponed; but the accumulation clause is entirely inconsistent with this supposition. He would in that case have directed an accumulation during this suspension of the vesting, as he has in the other specified case of suspension; whereas he has in terms confined it to the times during which a son of a son of *Isaac Isaac*, born in his (the testator's) lifetime should be under twenty-five, or any son of *Isaac Isaac*, born after his own death, or any grandson of *Isaac Isaac*, entitled to take under his will, should be under twenty-one. It is also obvious that the provision, so supposed to have been intentionally made, would not in all probability have effected the supposed intended object. The income of the property, between the time of the failure of all the persons designated to take and the deaths of all the sons and grandsons, being, according to the supposition, undisposed of, would have become the property of the next of kin at the time of the testator's death; and the next of kin might have been some of those designated persons, not intended to be benefited, unless they attained a certain age, or might have been the discarded son *Hyam*, for whom it is clear that the testator intended to provide a mere subsistence. It was also well observed that the gift to the *Gompertz* family is made subject to the annuities and charges given and created by the will;

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whereas, according to the construction contended for, it was also to be subject to a different application of the income during the lives of all sons and of all grandsons of *Isaac Isaac.*

If, therefore, these words are to receive their literal construction, I cannot doubt but that the testator's intention will be wholly defeated.

It was indeed contended, for the Defendant *Lyon Gompertz*, that the literal construction of the particular words was not such as is contended for by the Plaintiffs. I cannot assent to that proposition. It appears to me that in order to reconcile the different parts of the will, the words must be read as if they stood thus,—after the decease of "all *the said*," or "all *such* sons and grandsons," &c. It was said, that the words "from and immediately after," &c. would be useless repetition according to the construction of the Defendant. But that is not so; for although it is true that the contingencies upon which the gift over was to take effect are before specified, the word "then," if the subsequent words had been omitted, would not have been an adverb of time, but would have meant "in those events;" and the testator's object, as afterwards expressed, was, in those events, to give the property to *Joseph Gompertz*, but not until after the deaths of such sons and grandsons of *Isaac Isaac*, so contingently entitled, during whose lives the accumulation is afterwards directed: and the words "from and immediately after the decease," were probably introduced with a view to the accumulation afterwards directed, and, if so, they must be confined to periods during which the accumulations are directed, namely, the lives of grandsons of *Isaac Isaac*, who would have taken had they lived, and not the lives of grandsons who in no event could have been entitled.

These

These other parts of the case appear to me to leave no doubt of the testator's intention. But suppose the case had stood simply thus: — Provision is made for certain members of a class answering a particular description, and then a gift over is made upon the failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend upon the failure of the whole class, will be construed to take place upon the failure of that description of the class, who were to take; and, on the other hand, if it appears that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the Court will adopt such a construction as will extend the benefit, in the best way the law will admit, to the whole class. Of both these propositions the authorities present many examples.

In *Trickey* v. *Trickey* (*a*), the testator had provided for the children of his daughter at twenty-one, with a proviso that the children of any child of his daughter dying in the mother's lifetime should stand in the place of the parent; and then made a gift over, upon the death of all children of his daughter under twenty-one, or not leaving issue who should live to attain that age. This limitation over was held not too remote, the generality of the expression being confined by the prior provisions.

In *Bristow* v. *Boothby* (*b*), decided by Sir *John Leach*, and affirmed by Lord *Lyndhurst*, on appeal (*c*), the decision was the other way, upon the circumstances of the case; but the principle is recognised, Lord *Lyndhurst*, in his judgment, observing that the question was, whether the

(*a*) 3 *Mylne & Keen*, 560.
(*b*) 2 *Sim. & Stu.* 465.
(*c*) 30th *June* 1829.

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the term "issue" was to be taken generally, or to be restricted so as to denote issue before mentioned, and concluding by saying that it did not appear to him that there were any circumstances to lead to the conclusion that the term ought to be taken in the restricted sense with respect to the previous limitation. (*a*) In *Ginger dem. White* v. *White* (*b*), and *Goodright dem. Docking* v. *Dunham* (*c*), there were gifts to children of a person named, and gifts over if that person should die without issue, an expression which was held to mean such issue as before mentioned, that is, children.

The cases in which a gift over, upon a tenant for life under the will dying without issue, has been held to enlarge the estate for life into an estate tail, where some children only of such tenant for life have been before provided for, in order to let in others, proceed upon the supposed intention; and the rule is not applied where such intention to provide for all appears to be negatived, as in *Blackborn* v. *Edgley* (*d*), in which a gift over in case the tenant for life should die without issue, was construed as if it had been, "should die without *such* issue." In *Morse* v. *Lord Ormonde* (*e*), affirmed by Lord *Eldon* on appeal (*g*), estates in tail male were given to sons of the testatrix's daughter, with remainder to the daughters of such daughter in tail, and then various sums charged on the estates were bequeathed after the decease and failure of issue of the daughter; and, upon a question with respect to the validity of those charges, it was held that the words "failure of issue" must be construed "failure

(*a*) The Lord Chancellor here referred to a note of Lord *Lyndhurst*'s judgment, with which he had been furnished by Mr. *Russell*.

(*b*) *Willes*, 348.
(*c*) *Dougl.* 264.
(*d*) 1 *P. Wms.* 600.
(*e*) 5 *Mad.* 99.
(*g*) 1 *Russ.* 382.

"failure of issue aforesaid;" that is, failure of the objects of the prior limitations.

In *Malcolm* v. *Taylor* (*a*), the words "dying without issue" were construed to mean "without such issue as would take under the prior limitation;" Sir *John Leach*, Master of the Rolls, saying, that it is a reasonable intendment that a subsequent limitation is meant to take effect upon failure of the prior gift, and as a substitution in that event.

The cases of this kind, referred to for the Plaintiffs, of *Langley* v. *Baldwin* (*b*), and *Attorney-General* v. *Sutton* (*c*), do not decide that a general devise upon which a gift over is expressed to depend cannot be confined by the intention apparent upon other parts of the case; but they are cases in which it was thought necessary to give to such words their full ordinary meaning, in order to effectuate the apparent intention, and to let in children, to exclude whom there did not appear to be any intention, but with respect to whom it simply appeared that the former enumeration would not include them. In all the cases of limitation over of personal property upon a dying without issue, or upon a failure of issue, after a prior gift to issue of a particular description, that is, children, collected by Mr. *Jarman*, in his edition of *Powell on Devises* (*d*), the words "such issue," or "issue aforesaid," are important.

There is, in the present case, a peculiarity which distinguishes it from most others. There is no ambiguity as to the contingency or event upon which the gift over

(*a*) 2 *Russ. & Mylne*, 416.
(*b*) 1 *Eq. Ab.* 185.; and 1 *Ves. sen.* 26.
(*c*) 1 *P. Wms.* 754.
(*d*) Vol. ii. p. 530.

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over is to take effect; but the only question is, whether, such contingency or event having happened, the gift over is to be suspended in enjoyment until after the deaths of certain persons, who are not, in any construction, to be objects of the gift.

The result of all the authorities is, that in such cases as the present, if it be necessary to put a restricted sense upon the words used in the gift over, in order to effectuate the intentions of the testator, as evidenced by other parts of the will, it is competent for the Court to do so; and being satisfied, for the reasons I have before given, that the intention of this testator was, that the gift over should take effect upon the failure of the objects particularly described as the objects of his prior gift, I am of opinion that I must hold *Lyon Gompertz* to be entitled, and consequently that the demurrer must be allowed.

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*July* 28.

## The ATTORNEY-GENERAL *v.* KNIGHT.

Where in an information and bill, the same individual who is named as the relator, is also the Plaintiff suing in his own right, the Court will not dismiss the information and bill upon the ground that the relator, having been required by the Attorney-General to give security for costs, has failed to do so.

THIS was an information and bill filed by the Attorney-General, at the relation of *William Sutton*, on behalf of himself and the rest of the parishioners interested in a certain charity, and by the said *William Sutton* as Plaintiff, suing in his own right, against several persons who were trustees of the charity estates. Shortly after the information and bill was put upon the file, some of the Defendants presented a memorial to the *Attorney-General*, alleging that the relator was a day-labourer,

labourer, possessed of no property, and that the suit ought not to be suffered to proceed until the relator had given security to answer the costs. Upon the discussion of the memorial, it was objected that, inasmuch as *Sutton* was not only a relator, but also a Plaintiff on his own behalf, the Attorney-General had no control or jurisdiction over the suit. The *Attorney-General* however thought otherwise; and being of opinion that *Sutton* was not a fit person to be a relator, he directed that all further proceedings should be stayed until a proper relator was appointed, or sufficient security given for the costs.

The form of the security proper to be given in such a case was afterwards brought under the consideration of the Vice-Chancellor, upon a motion to dismiss the information and bill unless the relator should give satisfactory security; when his Honor expressed an opinion that the security proposed to be given by the relator, which was the bond of an individual for the sum of 100*l.*, was not sufficient; and he referred it to the Master to settle the form and extent of the requisite security in case the parties differed.

Subsequently the matter was again brought before his Honor, and his attention was, for the first time, called to the fact, that this was not merely an information, but an information and bill; and it was urged that the Court had no authority to compel a relator, who was also a plaintiff in the suit, to give security for costs. The Vice-Chancellor was of that opinion, and the application was therefore refused.

Mr. *Jacob* and Mr. *Koe*, for the Defendants, who appealed against his Honor's order, submitted that the Attorney-General had a perfect right to withdraw himself

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self from any information instituted by his authority, whenever the conduct or character of the parties prosecuting it, as relators, did not meet his approbation; and the suit would then of course fall to the ground. He could also, if he pleased, permit the relators to proceed with it upon such terms as he thought fit to impose. It was upon this ground that he had here called upon the relator to give satisfactory security for the costs; and the circumstance that the relator was also the Plaintiff, was no reason why he should not be subject to the same control as any other individual undertaking the responsibilities of that office.

*The* LORD CHANCELLOR said that this was substantially a suit in which there were two Plaintiffs, the one the Attorney-General at the relation of *William Sutton*, and the other *William Sutton* himself, suing in his own right. The circumstance of *Sutton* filling the double character of relator and Plaintiff appeared to him to make no difference at all in the question, which ought to be determined upon the same principle as if distinct persons acted in each capacity. In that case it would be clear that the Attorney-General could have no jurisdiction over the conduct of the Plaintiff in the bill, whatever right he might have to interfere for the purpose of controlling the proceedings in the information. The only question was, whether the Court had any authority to stop the Plaintiff's suit, on the ground that he was an insufficient or improper person to be named as relator in the information. No decision had been produced in support of the affirmative of the proposition: the Vice-Chancellor, when his attention was drawn to the point, was of opinion that the Court possessed no such authority; and in that opinion he entirely concurred.

Motion refused, with costs.

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## PRICE *v.* CARVER.

*May* 31.
*Aug.* 30.

A decree of foreclosure against an infant, must give the infant a day to shew cause against the decree, after he attains twenty-one, notwithstanding the provisions of the act 11 *G.* 4. & 1 *W.* 4. *c.* 47. *ss.* 10, 11.

IN this case the bill was filed by an equitable mortgagee of copyhold property, by deposit of copies of court roll, praying a foreclosure. Some of the parties interested in the equity of redemption were infants. At the hearing, before the Lord Chancellor, on the 8th of *April* 1837, his Lordship made the usual decree for a foreclosure; but, in drawing up the decree, a question arose whether the infant Defendants were to have a day to shew cause against the decree when they should attain twenty-one.

Mr. *Turner*, for the Plaintiff.

It is material, for the Plaintiff, that the decree should be drawn up in the proper form, and that the infant Defendants should not have any ground for shewing error in it. The doubt upon this subject arises in consequence of the decision of the Vice-Chancellor in the case of *Powys* v. *Mansfield* (*a*), upon the 10th and 11th sections of the act 11 *G.* 4. & 1 *W.* 4. *c.* 47. (*b*)

His

(*a*) 6 *Sim.* 637.

(*b*) The tenth and eleventh sections of this act are in the following words: —

Sect. 10. And be it further enacted, that from and after the passing of this act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of this act be carried on or prosecuted by or against any infant, where, according to law, the parol did not demur.

Sect. 11. And be it further enacted, that where any suit hath

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His Honor would seem to have been of opinion that before the passing of that act, the day to shew cause had been given only by analogy to the parol demurring; and that the abolition of the demurring of the parol involved the abolition of the day to shew cause. This, however, is a misconception. The rule which allowed an infant a day to shew cause, may perhaps be accurately stated as having been applicable to two cases, one, that of a mortgage, in which also the parol may have been allowed to demur; and the other, that in which it was necessary to take an estate out of an infant; *Sheffield* v. *The Duchess of Buckingham* (*a*), *Blatch* v. *Wilder*. (*b*) According to the old law, when real estates descended to an infant heir in fee, the parol demurred; but when they descended subject to a trust or charge for the payment of debts or legacies, the parol did not demur; but yet, in the latter case, the direction in the decree was that the infant should convey when he attained twenty-one,

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hath been or shall be instituted in any court of equity for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts; and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold, (by all proper assurances in the law,) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual, to all intents and purposes, as if such person or persons, being an infant or infants, was or were at the time of executing the same, of the full age of twenty-one years.

(*a*) *West's Rep. Temp. Hard.* 682. See p. 684.

(*b*) *Ibid.* 322. See p. 324.

one, unless he shewed cause to the contrary; *Hargrave* v. *Tindal* (*a*), *Mould* v. *Williamson* (*b*), *Pope* v. *Gwyn* (*c*), *Uvedale* v. *Uvedale*. (*d*)

The proper form of the decree in this case will be to direct an account of what is due for principal, interest, and costs; to declare that, in default of payment, all parties shall be foreclosed; and that the adult Defendants shall convey immediately, and the infant Defendants shall convey when they come of age, unless, being served with a *subpœna*, they shall shew cause against the decree. The Defendants propose that the decree should direct that the Plaintiff shall hold and enjoy until the infants attain twenty-one. That proposed provision is adopted from the form of the decree in *Spencer* v. *Boyes*. (*e*) That decree, however, is not in the form now used; for the Court now decrees a foreclosure in the first instance. Upon referring to that case in the Registrar's Book, it appears that it was a case in which the mortgaged property had been conveyed by the mortgagor to the mortgagee by lease and release; and the mortgagor, who was the Defendant in the suit, had entered into a covenant for further assurance. A bill having been filed for a foreclosure, the Defendant, by his answer, stated that the property was copyhold, and did not pass by the conveyance: upon which a supplemental bill was filed, stating the covenant for further assurance; and Lord *Alvanley* held that, under such a covenant, the Plaintiff could not be entitled to a better conveyance than that which would be made by lease and release.

Mr. *Heberden*, for the infant Defendants.

The

(*a*) 1 *Bro. C. C.* 156. n.
(*b*) 2 *Cox*, 386.
(*c*) 2 *Dick.* 683.
(*d*) 3 *Atk.* 117.
(*e*) 4 *Ves.* 370.

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The legislature can only be considered as having abolished the strict technical demurrer of the parol. Strictly speaking, the parol demurred only in those cases in which the infant heir was sued by the creditor of his ancestor: *Plasket* v. *Beeby* (*a*), *Chaplin* v. *Chaplin.* (*b*) In equity, however, it appears to have been held that the parol should be allowed to demur in favour of a devisee, although at law it would demur only in favour of an heir: *Powell* v. *Robins* (*c*), *Lord Falkland* v. *Bertie* (*d*), *Eyre* v. *The Countess of Shaftsbury* (*e*), *Napier* v. *Lady Effingham* (*g*), *Kelsall* v. *Kelsall.* (*h*) The determinations in *Uvedale* v. *Uvedale* and *Mould* v. *Williamson* proceeded upon the ground that a court of equity, having special jurisdiction over infants, would protect their interests. So also *Lechmere* v. *Brazier* (*i*), *Scarth* v. *Cotton* (*k*), *Sweet* v. *Partridge* (*l*), shew the utmost extent to which the Court has gone in relieving creditors against the heir. Where a conveyance is directed, it follows, of necessity, that a day must be given to shew cause.

The act of parliament was passed for the particular object of facilitating the payment of debts out of real estate. Its terms, however, are general enough to apply to all cases; but that they were not intended to be understood in their largest extent, appears from the circumstance that the case of an infant heir of a vendor is provided for by a subsequent statute.

This case is precisely similar to *Spencer* v. *Boyes.*

Mr.

(*a*) 4 *East*, 485.
(*b*) 3 *P. W.* 365. See p. 368.
(*c*) 7 *Ves.* 209.
(*d*) 2 *Vern.* 342.
(*e*) 2 *P. W.* 103. See p. 119.
(*g*) 2 *P. W.* 401.
(*h*) 2 *Mylne & Keen*, 409.
(*i*) 2 *J. & W.* 287. See p. 290.
(*k*) *Jacob*, 635. n.
(*l*) 1 *Cox*, 433.

Mr. *Turner*, in reply.

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When *Powell* v. *Robins* was decided, *Plasket* v. *Beeby* had not been determined. In *Kelsall* v. *Kelsall*, Lord *Brougham* expressly says, that the privilege of putting in a new answer does not extend to decrees in foreclosure suits, and that an infant may be foreclosed.

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*The* LORD CHANCELLOR. *Aug. 30.*

The question argued in this case upon the minutes was, whether the infant Defendants were to have a day to shew cause after attaining twenty-one. I have not seen the pleadings, but, from the form of the decree, I presume that the Plaintiff is an equitable mortgagee, and that the legal estate is in the infants. The decree, in the event of the mortgage not being redeemed, after directing a foreclosure, directs a surrender or conveyance of the legal estate to the Plaintiff. Whether this be the proper form of decree, has not been argued before me; but the parties may probably be advised to consider whether a sale would not be the proper course. I proceed, however, to consider the only question argued before me, namely, whether, supposing the decree to be in other respects correct, the infant Defendants ought to have a day to shew cause, after attaining twenty-one. That they would have had a day to shew cause, according to the course hitherto pursued, is quite clear, the decree being both to foreclose and to procure a conveyance from the infants. But it is said that the stat. 11 *G.* 4. & 1 *W.* 4. *c.* 47. *s.* 10. has altered the course of proceeding. That statute only enacts that the parol shall not in future demur. If the parol demurring and the giving a day to an infant be synonymous terms, then this statute has prohibited the giving a day in future; but if the terms be not synonymous, then the statute does

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not affect the practice in question in this case. I have always conceived that the parol demurred in equity in those cases only in which it would have demurred at law. The origin and limits of this course at law are well explained in *Plasket* v. *Beeby* (*a*); and the cases there put, of the parol demurring, have no reference to the cases in equity in which a day is given to an infant to shew cause; indeed, the shape of the decree in the two cases is perfectly different. When the parol demurs in equity, nothing is done to affect the infant; but when a day is given, the decree is complete; but the infant has a day given to shew cause against it, and if he do not shew good cause within the time specified, he is bound. In some cases, indeed, the distinction is most apparent, the Court deciding that the parol did not demur, and therefore making the decree, but giving the infant a day to shew cause. In *Uvedale* v. *Uvedale* (*b*), Lord *Hardwicke* puts a case in which the parol could not have demurred, but the infant would have had a day given. So in *Chaplin* v. *Chaplin* (*c*), it was held that the parol did not demur; but the legal estate, being in the son, could not have been got from him till twenty-one, and the decree must have given him a day to shew cause. In *Fountain* v. *Caine* (*d*), there was a trust to pay debts, and the parol did not demur, but a day was given to the infant. *Powell* v. *Robins* (*e*) was a case in which the parol demurred, and no sale was directed till the heir attained twenty-one. In *Pope* v. *Gwyn* (*g*) the assets were held to be equitable; and the parol did not demur, but a day was given to the infant heir. *Spencer* v. *Boyes* (*h*) was not a case of the parol demurring, but a day to shew cause was given to the infant heir. All cases

(*a*) 4 *East*, 485.
(*b*) 3 *Atk.* 117.
(*c*) 3 *P. W.* 365.; see p. 368.
(*d*) 1 *P. W.* 504.
(*e*) 7 *Ves.* 209.
(*g*) 8 *Ves.* 28. n.; 2 *Dick.* 683.
(*h*) 4 *Ves.* 370.

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cases of foreclosure and partition, and all others in which a conveyance is required from an heir, except those in which the parol would demur at law, are cases in which a day is given, but the parol does not demur. Of all such cases the statute takes no notice, and affords no remedy for them, except that by the eleventh section it enables the Court to take from the infant the legal estate of property decreed to be sold for the payment of debts, but for that purpose only. In all other cases in which a conveyance is required from an infant, the law remains as before, and the practice, therefore, must remain the same. There must be a decree for the infant to convey at twenty-one, and he must have a day to shew cause, as before. (*a*)

The present is precisely such a case; and I think, therefore, that the decree, if taken in its present form, must be according to the former practice, which I apprehend to be as the minutes stood altered by the Plaintiff.

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The decree, as ultimately drawn up, stood as follows: —

His Lordship doth order and decree that it be referred to the Master of this Court, in rotation, to take an account of what is due to the Plaintiff for principal and interest in respect of the mortgage security in the pleadings mentioned, and to tax the costs of this suit. And upon the Defendants, or any or either of them, paying to the Plaintiff what the said Master shall find due to her for such principal and interest as aforesaid, and for the costs of this suit, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered that

(*a*) See *Scholefield* v. *Heafield*, 7 *Sim.* 669.

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that the Plaintiff do deliver up to the Defendants so paying her, the memorandum in the bill mentioned, and do execute all necessary acts and deeds for releasing and discharging the premises in question from payment of the principal and interest secured on the same, and from any incumbrances done by her, or any claiming under her, and deliver, upon oath, all the title deeds and writings in her custody or power relating to the said premises to the Defendants, or as they shall direct. But in default of the Defendants, or any of them, so paying to the Plaintiff what shall be found due as aforesaid, at the time aforesaid, the Defendants are, from thenceforth, to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption, of, in, and to the said premises. And in case of such foreclosure, the Defendants are to deliver up to the said Plaintiff the possession of the said mortgaged premises. And the Defendants, *Thomas Carver* and *Mary* his wife, *John Dodwell* and *William Dodwell*, and the Defendants the infants, *William Dodwell* the younger, *Sarah Dodwell*, *Mary Dodwell*, and *Theresa Dodwell*, on their attaining twenty-one, are to do all necessary acts, so as duly to convey, surrender, and assure the same to the Plaintiff. And this decree is to be binding on the Defendants, the infants, unless, on being served with *subpœna*, they shall, within six months after they shall attain the age of twenty-one, shew unto this Court good cause to the contrary. And for the better taking of the said accounts, the parties are to produce, before the said Master, upon oath, all deeds, papers, and writings in their custody, or power relating thereto; and are to be examined upon interrogatories as the said Master shall direct, who, in taking the said account, is to make unto the parties all just allowances, and any of the parties are to be at liberty to apply to this Court as they may be advised."

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## SMITH *v.* OLIVER.

*July* 28.

The 17th order of 1831 applies only to cases in which the Plaintiff requires a commission.

THE bill was filed on the 20th of *October* 1836, and the answer on the 20th of *January* 1837. On the 2d of *May* 1837, the Plaintiff filed a replication, of which, however, no notice was given to the Defendants. No *subpœna* to rejoin was served; and the Defendants, on the 25th of *May*, gave notice of a motion, and, on the 2d of *June*, moved, to dismiss the bill for want of prosecution. Upon that motion, the Vice-Chancellor held that it was not requisite for the Plaintiff to give notice of having filed a replication, but that the Defendants ought to ascertain how that fact was, before giving notice of motion to dismiss: and it being stated at the bar, that the Plaintiff did not require a commission to examine witnesses, his Honor decided that the seventeenth order of 1831 did not apply, but that the case must be dealt with according to the old practice; and he accordingly refused the motion.

The motion was now brought on, by way of appeal, before the Lord Chancellor.

Mr. *Wigram* and Mr. *Bazalgette*, for the motion.

This case is distinguishable from *Williams* v. *Janaway* (*a*); for there a *subpœna* to rejoin was served, and the motion was grounded on default in the subsequent proceedings; whereas here, no such *subpœna* has been served, although, according to the exigency of the seventeenth order of 1831, it ought to have been served within three weeks from the filing of the replication. That

(*a*) 6 *Sim.* 77.

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That such was the true meaning of this order, is evident from the grammatical construction. The word "he," preceding the words "shall serve the *subpœna* to rejoin" is the nominative case not only to the verb "shall serve" in that branch of the sentence, but also to the verbs "shall obtain and serve," in the next branch; and the concluding words "within three weeks from the filing of the replication," at the end of the sentence, like the word "he," at the commencement, apply equally to both branches of the sentence, although the words "in case he requires a commission to examine witnesses," apply only to the verbs which they immediately precede, and are carefully introduced in that particular place to shew that they are so confined. When the order afterwards states that the bill shall be dismissed, "if the Plaintiff shall make default herein," it must mean that in every case, if the Plaintiff fails to serve a *subpœna* to rejoin within the three weeks, the bill shall be dismissed; and that in cases where, having served a *subpœna* to rejoin within the time, the Plaintiff requires a commission, if he fail to obtain such commission and take the other steps mentioned in the order within the time specified in it, the Defendant may move to dismiss; thus rendering the service of the *subpœna* indispensable, in all cases, to prevent the bill being dismissed; but leaving the obligation to take the other proceedings, within the time mentioned in the order, conditional, and applicable to those cases only in which the Plaintiff requires a commission. This view is confirmed by the subsequent part of the order, whereby, if the Plaintiff fails to do so, the Defendant is enabled to obtain a commission, in case the Plaintiff files a *subpœna* to rejoin within three weeks after filing the replication; from which it must be inferred that the framers of the order contemplated that the Plaintiff would be compellable by it to serve the *subpœna* within that

that time, in every instance; for it would have been nugatory to introduce this latter provision if the Plaintiff could, with impunity, by a few days delay, deprive the Defendant of the benefit of it. In *Brown* v. *Moore* (*a*), a case under the seventeenth order of 1828, the Vice-Chancellor dismissed the bill, on the ground of the *subpœna* to rejoin not having been served within the time limited by that order; and the only difference between that order and the seventeenth order of 1831 (besides the extension of time), consists in the circumstance that the latter limits the obligation to obtain a commission, and, as a consequence, the proceedings subsequent to and dependent on the commission, to cases in which the Plaintiff requires a commission. The certificate cited in the *Anonymous Case* (*b*), and the judgment of the Master of the Rolls in *Carden* v. *Manning* (*c*), and in *White* v. *Smith* (*d*), are also authorities in favour of the present application. That the operation of the seventeenth order is not confined solely to cases in which the Plaintiff requires a commission, appears from the case of *Flight* v. *Jones* (*e*). The wording of the sixteenth order of 1831, is precisely similar to that of the seventeenth, so far as it comes under discussion; and, according to the orders drawn up upon applications under that order, and the practice thereon, the Plaintiff was obliged to serve a *subpœna* to rejoin within three weeks from the filing of the replication in all cases. Such orders are to be taken as the deliberate decisions of the Court, and are, therefore, authorities in favour of the present motion; otherwise the Registrars are not authorised to draw up the orders upon motions under the sixteenth order in the present form. (*g*)

Mr.

(*a*) 2 *Sim.* 464.
(*b*) 5 *Sim.* 497.
(*c*) 1 *Keen*, 380.
(*d*) 1 *Keen*, 381.
(*e*) 7 *Sim.* 256.
(*g*) See 1 *Smith's Chancery Practice*, p. 238. 1 *Keen*, 380.

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Mr. *Jacob* and Mr. *S. P. White*, *contrà*.

*The* LORD CHANCELLOR held that the seventeenth order applied only to cases in which a commission was required; observing, that he had so decided more than a year ago (*a*), after a communication with the Vice-Chancellor; and his Lordship dismissed the motion. (*b*)

(*a*) See *Crooke* v. *Trery*, the next case.

(*b*) See *Daniell* v. *Austen*, 8 *Sim.* 19.

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## CROOKE *v.* TRERY.

The provisions of the 17th Order of 1831, with respect to serving *subpœnas* to hear judgment, do not apply to the case of a Plaintiff who does not sue out a commission to examine witnesses.

ON the 25th of *February* 1835, upon a motion, under the sixteenth of the new orders, that the bill might be dismissed for want of prosecution, an order in the usual form was made that the Plaintiff should file a replication, serve *subpœnas* to rejoin, and obtain and serve an order for a commission to examine witnesses, if she should require such commission, within three weeks from that time, and give rules to produce witnesses and pass publication in *Trinity* term then next, and set the cause down for hearing, and serve *subpœnas* to hear judgment returnable in *Michaelmas* term then next, or that in default thereof the bill should stand dismissed.

In compliance with this order, a replication was filed and *subpœnas* to rejoin were served within three weeks from the date of the order. The Plaintiff did not sue out a commission; but the usual rules to produce witnesses were given, and publication passed in the cau

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in *Trinity* term 1835. The cause was set down for hearing on the 24th of *November*, being the last day but one of *Michaelmas* term; and, on the same day, *subpœnas* to hear judgment were served, returnable on the 10th of *December* following.

The Vice-Chancellor having refused a motion that the *subpœnas* to hear judgment might be set aside for irregularity, and that the bill might be dismissed for want of prosecution, the motion was renewed before the Lord Chancellor, by way of appeal.

Mr. *Jacob*, for the motion, contended that the Plaintiff had failed to comply with the exigency of the seventeenth of the new orders, as expounded by the order of the 25th of *February* 1835, specifying the terms upon which alone she was to be at liberty to keep her bill in court. According to those terms, she was to set down her cause and serve the *subpœnas* to hear judgment returnable in *Michaelmas* term, being the succeeding term to that in which publication passed. Now, although she had set down the cause for hearing in *Michaelmas* term last, yet the *subpœnas* to hear judgment were not made returnable until three weeks after the expiration of that term. It was no answer to the objection to say, that because she had not required a commission to examine witnesses, she was, therefore, to be exempt from the obligation to fulfil the subsequent requisitions of the order. Such a construction would effectually defeat the purpose of the new orders, wherever a Plaintiff was able to carry on his suit without the aid of a commission to examine witnesses.

Mr. *Wakefield*, *contrà*, insisted that no provision was to be found in either of the orders referred to, for the case which had occurred. All the regulations of the seven-

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seventeenth order would be found, on an attentive perusal, to be strictly limited to cases where the plaintiffs required a commission to examine witnesses. The subsequent course of proceeding to be taken where no such commission was required, was not provided for in any part of the seventeenth order, and was, in fact, a *casus omissus*. This point was expressly decided in *Williams* v. *Janaway* (*a*).

*The* LORD CHANCELLOR said, he had had a communication on the subject with the Vice-Chancellor. The order of the 25th of *February* 1835, was intended to be made in pursuance of the sixteenth of the new orders, and was in the usual form adopted by the officer of the Court, where, upon a motion to dismiss, the undertaking to speed was given. But upon a careful consideration of the language, both of the sixteenth order and of the seventeenth, on which the argument had been principally rested, he concurred with his Honor in the conclusion that neither of them applied to the present case.

Motion refused with costs.

(*a*) 6 *Sim.* 77.

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## FRANK *v.* FRANK.

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*Aug* 9. 11.

The consent of a married woman, by her counsel, to release her jointure, and accept an allowance for maintenance during the life of her husband, who was a lunatic, without prejudice to her right to dower, held not to be binding upon her, after his decease.

A *feme covert* is not competent, during the coverture, to elect between a jointure made to her after marriage and her dower at common law.

*EDWARD FRANK* was tenant for life of certain estates in the counties of *Norfolk* and *Suffolk*, with a power of charging those estates with an annual sum, not exceeding 400*l.* by way of jointure for any woman with whom he might intermarry. By a deed, dated the 6th of *February* 1813, and executed many years after his marriage, in pursuance of the power, he appointed the yearly sum of 400*l.* to be raised and paid after his decease, to his wife *Mary F. Frank*, for her life, with the usual powers of distress and entry in case of non-payment, such annuity to be for her jointure and in lieu of dower.

In the month of *August* 1825, *Edward Frank* was, upon inquisition, found to be a lunatic, and to have continued in a state of lunacy from the 25th of *October* 1816, downwards.

By an order, in the lunacy, it was referred to the Master to inquire and certify whether an indenture of release, dated the 10th of *February* 1823, was a valid deed, or otherwise, and also what *Mary F. Frank*, the wife of the lunatic, asked as an allowance for her maintenance, and what she claimed as a matter of right under the said indenture; and in case she consented to give up her claim under the same, the Master, in settling the allowance for her maintenance, was to take into consideration the circumstances and situation of *Mary F. Frank*, and certify what would be a proper allowance for her.

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The Master, by his report, after stating the substance and effect of the deed of appointment of the 6th of *February* 1813, and also of two other deeds of the 9th of *April* 1813, and the 10th of *January* 1817, respectively, found, among other things, that *Mary F. Frank* had consented before him to release and give up all her claim, right, and interest under the several deeds of the 6th of *February* 1813, the 9th of *April* 1813, the 10th of *January* 1817, and the 10th of *February* 1823, and that he was of opinion that 350*l.* per annum would be a proper sum to be allowed to her by way of maintenance, to commence from *Lady-day* 1827.

By an order of the 13th of *August* 1828, made upon a petition in the lunacy, and reciting that *Mary F. Frank* had appeared by counsel on the petition, and consented to release and give up all her claim, right, and interest under the several deeds of the 6th of *February* 1813, the 9th of *April* 1813, the 10th of *January* 1817, and the 10th of *February* 1823, respectively, the report as to the allowance for maintenance was confirmed. That order was subsequently varied by the addition of the words "but not to deprive *Mary F. Frank* of her dower."

The lunatic died in *October* 1834, and *Mary F. Frank*, as his widow, became entitled, under the appointment of the 6th of *February* 1813, to a jointure of 400*l.* per annum for her life, charged upon his real estates, unless she had barred herself by the consent, which the order of the 13th of *August* 1828 recited her to have given, to release that interest.

Shortly after the death of the lunatic, the tenant in tail in possession of the settled estates, who was an infant, filed this bill. The principal object of the bill was to have it declared that *Mary F. Frank*, the widow of the

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the lunatic, had in equity waived her right to the jointure of 400*l.* a year under the deed of the 6th of *February* 1813; or, if not, that she might be put to her election between that provision and her dower at common law. By a report, dated the 20th of *December* 1836, and made upon a reference in the cause, the Master found that the jointure of *Mary F. Frank*, created by the deed of the 6th of *February* 1813, was now an existing charge upon the estates of the Plaintiff, but that, under the circumstances stated, she had in equity freed the estates from the same.

*Mary F. Frank* then presented a petition in the lunacy, praying that the order of the 13th of *August* 1828, might be discharged; and she also took exceptions, in the cause, to the report of the 20th of *December* 1836. The petition and the exceptions were set down and ordered to be brought on together.

The grounds on which the order of the 13th of *August* 1828 were impeached, as stated in the petition, were chiefly three; first, that no consideration was given to the petitioner for the interest which she was represented as having consented to waive; secondly, that the Master's report, and the subsequent confirmation of it, were wholly irregular, inasmuch as the nature and amount of her interest under the deed of the 6th of *February* 1813, were never referred to him; and thirdly, that, being a *feme covert*, her consent, even if regularly and formally taken, was not binding upon her, no case of election having been made.

*The* LORD CHANCELLOR said that in the lunacy he had no jurisdiction over the Plaintiff in the cause, and it was, therefore, impossible to proceed with the hearing of the petition; but the matter might be properly

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perly entertained and disposed of upon the exceptions, which raised precisely the same question.

Mr. *Wigram*, Mr. *Parker*, and Mr. *Willcock*, in support of the exceptions, then submitted that it was unnecessary to consider the two points first suggested in the petition, as the last objection there stated to the finding of the Master was conclusive. No authority could be produced to shew, and it would be contrary to all principle to hold, that a married woman was competent to release a future right by means of a consent given in the manner and under the circumstances in which Mrs. *Frank*'s consent was stated to have been given in this case. Neither the Master nor the Court had any jurisdiction to take such a consent, which, therefore, was merely inoperative. They referred to *Brown* v. *Benson* (*a*), *Richards* v. *Chambers* (*b*), *Ritchie* v. *Broadbent* (*c*), *Pickard* v. *Roberts* (*d*), *Mole* v. *Smith* (*e*).

*The* LORD CHANCELLOR said it might, for the purpose of the argument, be assumed, and indeed there could be no doubt, that Mrs. *Frank* had bound herself, if she was competent to do so; for she had, by her counsel, consented to accept the allowance for maintenance, and release the jointure.

Mr. *Cooke*, for the Plaintiff.

The sole question is whether the right to jointure under the deed of *February* 1813, has been already waived by Mrs. *Frank*. If not, she will now be called upon to elect, and may, by her counsel, elect at the bar between that provision and her dower, out of the estate of

(*a*) 5 *East*, 351.
(*b*) 10 *Ves.* 580.
(*c*) 2 *J. & W.* 456.
(*d*) 3 *Mad.* 384.
(*e*) 1 *J. & W.* p. 668.

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of which she is dowable; and, as the former greatly exceeds the latter in point of value, there can be no doubt which she will prefer. I contend, however, that by the consent given in Court and recited in the order of the 13th of *August* 1828, to release all claim under the deed of the 6th of *February* 1813, and accept the allowance for maintenance thereby provided, her claim to the jointure is, in equity, effectually barred, and that nothing now remains for her but to resort to her dower at law. It is admitted that if she was competent to give that consent, she is bound by it; but it is argued that she was not competent to consent, inasmuch as she was then under coverture. It is to be observed, however, that though married, Mrs. *Frank* could not be said to be under the control of coverture. Her husband being a lunatic, she was, for all practical purposes, and in the eyes of a court of equity, she ought to be considered as a *feme sole*. Even at law, cases have occurred where the husband being out of the realm, the Court of Common Pleas has permitted the wife to acknowledge a fine of her estate without her husband, in this respect treating her as if she were not under disability; and the principle of those cases, viz., that she was free from the marital control, ought equally to be extended to an election made by a wife whose husband is a lunatic. It is not correct to say that Mrs. *Frank* gave up a certain and permanent income of 400*l.* a year, to arise after her husband's death, for a precarious allowance during his life time, and that there was no mutuality in the terms of the agreement. The allowance by way of maintenance was to commence immediately, and upon her husband's death she was to be remitted to her dower, so that she secured a present, and did not deprive herself of a future, income. It was, therefore, strictly an election between jointure on the one hand, and dower, with the

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the addition of an immediate provision, on the other; and my proposition is that, in this Court, a married woman is competent to make such an election, and will be bound by it, wherever the relative values of the two interests appear to be uncertain, and it is or may be for her advantage to exercise her option. Thus, in *Ardesoife* v. *Bennet* (*a*), a *feme covert* was held to have elected, by her acts, to take under a will, in opposition to the interest she acquired as the testator's heiress at law; and that was a much weaker case, for no formal consent was ever given. So in *Lady Cavan* v. *Pulteney* (*b*), Mrs. *Pultency* was directed, in her husband's life time, to make her election to take, either under the will of Sir *W. Pulteney*, or under the will of General *Pulteney*; and if she should elect to take an estate tail under the former, then it was declared that she should not be entitled to any estate under the latter; and it was subsequently held that certain proposals laid by her before the Master, amounted to an election to take under the will of Sir *W. Pulteney*. In *Wilson* v. *Lord John Townshend* (*c*), it was decided that a *feme covert* was bound to elect between a life-annuity given by will, to her separate use, charged upon a devised estate, and a title paramount to a part of the same estate; and it was there laid down by Lord *Loughborough*, referring, with approbation, to the language of Chief Justice *De Grey* in *Lord Darlington* v. *Pulteney* (*d*), that "election applies to interests of married women, interests immediate, remote, contingent, of value, and not of value." (*e*) The same doctrine is recognised in *Vane* v. *Lord Dungannon* (*g*).

Mr.

(*a*) 2 *Dick.* 463.
(*b*) 2 *Ves.* jun. 544.
(*c*) *Ibid.* 693.
(*d*) See 7 *Bro. P. C.* 530.
(*e*) 2 *Ves.* jun. 696.
(*g*) 2 *Scho. & Lef.* 118.

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Mr. *Wigram*, in reply.

In all the cases referred to by Mr. *Cooke*, the question was ripe for election; for both the interests had accrued in possession, and it was necessary, for the sake of third parties interested adversely, that the *feme covert* should then exercise her option. The present, however, was not a case of election between jointure and dower; but between jointure, which is a provision to arise after the husband's decease, and an allowance for maintenance during his lifetime. The law on this subject is ably discussed by Mr. *Roper* (*a*), who lays it down expressly that "the period for the wife to make election, is at her husband's death, and not sooner;" and he refers to a number of authorities in support of that proposition. The same doctrine, deduced from a passage in the *first Institute*, is also to be found in a note in *Viner's Abridgment*, where, speaking of jointure, it is said, "but if the jointure had been made after marriage, there, notwithstanding such alienation, yet seeing her estate was originally waivable, and her time of election was not till after the death of her baron, she may claim her dower in the residue; whereas, in the other case, the jointure being made before marriage, was not waivable at all." (*b*)

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*Aug.* 11.

*The* LORD CHANCELLOR [after stating the facts of the case].

What Mrs. *Frank* was to become entitled to under the deed of *February* 1813, was a jointure to arise upon the death of her husband; in other words, a reversionary interest in land, to commence after the expiration of her husband's life. If, instead of land, it had been

(*a*) 1 *Rop. H. & W.* by *Jacob*, 348. (*b*) 14 *Vin. Ab.* 548. pl. 11. n.

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been money, the Court would not have allowed her, by any act of hers during coverture, to bind her right to a reversionary interest of that description. Without her consent, the Court would not have dealt with it or disposed of it at all; and her consent the Court would have refused to take.

It is said, however, that because this is an estate in land, the case is different; and Mrs. *Frank* is supposed to have waived her right by consenting, through her counsel at the bar, to release it. A married woman is not capable of parting with an interest of this nature under such circumstances. The argument was not attempted to be supported upon the ground of the consent being binding upon her; but it was put in the only mode in which it could possibly be put, namely, that her consent amounted, in equity, to an election, that is to say, an election between her title to dower, and her right under the deed of *February* 1813, giving her a jointure in bar of dower.

To this, one obvious answer is, that the question was never put to Mrs. *Frank* in the shape of an election. The supposed election was not between dower and jointure, but between the allowance for maintenance during the life of her husband on the one hand, and the jointure secured by the deed on the other. It is true that the order goes on to declare, that the acceptance of the maintenance shall not deprive Mrs. *Frank* of her right to dower; but the report, and the order founded upon it, never formally raised the question as a case of election at all.

If, however, upon the proceedings in this Court, the question had been distinctly raised, and had assumed that shape, still it is perfectly clear that a married woman could

could not be bound by an election so made. The statute which regulates this question, the 27 *H.* 8. *c.* 10., provides, in the ninth section, that in case of a jointure made after marriage, the wife, if she outlive her husband, shall be at liberty, after the death of her husband, to refuse to accept the lands given to her in jointure. There is, therefore, an express provision that her election shall be made at the time when the right is claimed, that is to say, after her husband's death; and a case in the 19 *Eliz.* reported in *Dyer* (*a*), proceeds upon the authority, or rather is a judicial exposition, of that clause in the statute, and decides that the period of election shall not be until after the right has accrued.

For these reasons it is clear, first, that there never was properly an election at all, and secondly, that if there had been such election, it could not be now binding upon Mrs. *Frank.*

Another observation arises on the case, shewing, indeed, that election between dower and jointure was never in the contemplation of the Court, and that is, that in the proceedings upon which the Plaintiff relies as amounting to a waiver of the jointure, none of those precautions and safeguards were interposed which the Court is in the habit of requiring for the sake of protection, wherever the interests of a married woman are concerned.

Upon these grounds I am of opinion, that there is nothing to debar Mrs. *Frank* from now electing to take either dower or jointure, as she may think most for her benefit.

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Mrs. *Frank* thereupon elected by her counsel to accept the jointure.

(*a*) *Anon*, 358. *b.*

1837.

## GEE *v.* COTTLE.

*Aug.* 9.
1838.
*March* 28.

A Defendant in custody for want of the answer of himself and his wife, cannot clear his contempt by putting in the separate answer of himself only.

Where a Defendant, who is in the *Fleet* for a contempt in not putting in his answer, is reported to be a fit object to have the benefit of the provisions of the act 1 *W.* 4. *c.* 36., the Court will not interfere in his behalf in such a manner as to prejudice the interests of a Plaintiff whose proceedings have been regular.

THE Defendant *Moses Cottle*, having been attached for want of the answer of himself and his wife, was brought up to the bar by writ of *habeas corpus*, and turned over to the *Fleet*. Shortly afterwards, the visiting Master inquired into his case, and reported in favour of his liberation; and upon his putting in his own answer only, on the 12th of *December* 1836, the usual order for his discharge was made under Sir *E. Sugden*'s act. (*a*)

Mr. *Tinney* now moved that the answer, which was the separate answer of the husband only, although he had obtained no order allowing him to answer separately, should be taken off the file; or that the Plaintiff might be at liberty to sue out a new attachment, and that the Defendant's solicitor might be ordered to pay the costs. He submitted that the contempt could not be purged until the answer of the wife, as well as that of the husband, had been put in; and that the order of the 12th of *December* 1836, was a fraud upon the Court.

*The* LORD CHANCELLOR ordered, that the order of the 12th of *December* 1836, should be discharged, with costs against the Defendant; and that the answer of the Defendant should be taken off the file for irregularity, and that the Plaintiff should be at liberty to proceed, by attachment, for the answer of the Defendant and his wife.

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In

(*a*) 1 *W.* 4. *c.* 36.

1838.

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1838. *March* 28.

In pursuance of the last-mentioned order, a fresh attachment issued against the Defendant, upon which he was arrested and lodged in gaol. He was afterwards brought up to the bar by writ of *habeas corpus* on the 4th of *November* last, and turned over to the *Fleet*; and the Plaintiff thereupon took proceedings with a view to having the bill taken *pro confesso* against him, under the provisions of the 1 *W.* 4. *c.* 36. *s.* 15. *rule* 2.

Mr. *Blunt* now moved that the Defendant might be at liberty to answer separately from his wife, and that upon having so answered, he might be discharged, and that the costs of his contempt might be paid out of the suitors' fund. It was clear from the circumstances, and was expressly sworn to in an affidavit which the Defendant had made, that he had no power or control over his wife; and where that was the case, the course of the Court was to allow the husband to put in a separate answer; *Barry* v. *Cane* (*a*), *Garey* v. *Whittingham*, (*b*)

Mr. *James Russell*, for the Plaintiff, opposed the motion, on the ground that, if granted, it would defeat the ends of justice. In pursuance of the order of the 9th of *August* last, a new attachment was sued out, and the Defendant was again committed to the *Fleet*, and the Plaintiff was now going on in the regular course, under the provisions of Sir *E. Sugden*'s act, to have the bill taken *pro confesso*; and in the course of a few days he would be in a condition to obtain the order for that purpose. To allow the Defendant, in the mean while, to file a separate answer, and clear the costs of his contempt by the assistance of the suitors' fund, under the seventh rule in that act, would entirely frustrate the Plaintiff's

(*a*) 3 *Mad.* 472. (*b*) 1 *Sim. & S.* 165.

1838.

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Plaintiff's proceedings at a time when he was on the very point of reaping their fruits.

*The* LORD CHANCELLOR.

Although the Court will do what it can to relieve a Defendant, and give him the benefit provided for him by the statute, it will never do so in such a manner as to prejudice the interests of a Plaintiff. The present Plaintiff, who, having been perfectly regular, is in a situation to obtain the relief he seeks in the course of a few days, would, if I discharged the Defendant, be under the necessity of beginning again. The Defendant, besides, is not entitled to favour, for he has not come forward to ask the assistance of the Court till the very last moment, when the Plaintiff is on the point of getting the fruits of his suit; his object being to stop the Plaintiff, and compel him to commence his proceedings anew. The proper course will be to let the motion stand over for the present; and if the Plaintiff does not do that which he asserts he is in a condition to do, the Defendant may then bring it on again.

1837.

## HESLOP *v.* METCALFE.

1837.
*Dec.* 20. 22.

Order made on a solicitor, who withdrew from the conduct of the Plaintiff's cause, that he should deliver up to the Plaintiff's new solicitor the briefs of the pleadings, counsels opinions thereon, office copies of the several answers, and all such other papers and documents, connected with the cause, as, upon inspection, such new solicitor might deem necessary for the hearing; without prejudice to any right of lien for costs, and upon an undertaking to return them undefaced within ten days after the hearing.

*RICHARD TILLYER BLUNT* was employed as the Plaintiff's solicitor in the conduct of this suit, from the period of its institution, in the month of *September* 1834. On the 12th of *January* 1836, he delivered his bill of costs, from which it appeared that, after giving credit for certain sums advanced by the Plaintiff, there was due to him, on account of his charges in this cause, independently of other charges, a balance of 97*l.* On the 12th of *February* 1836, Mr. *Blunt* sent a letter to the Plaintiff, in which he stated that he had no funds in his hands available to the prosecution of the suit, and that he must, therefore, request payment of the balance of 215*l.* 1*s.* 4*d.*, due on his general bill of costs delivered, and the subsequent costs; otherwise, the Plaintiff must abide the consequences. On the 9th of the same month, Mr. *Blunt* had sued out a writ against the Plaintiff for the amount of the alleged balance; and upon that writ the Plaintiff was, on the 15th of *February*, arrested and held to bail. A second bill of costs, amounting to 36*l.* 19*s.*, and including the charges for business done in this cause from the 12th of *November* 1835 to the 15th of *February* 1836, was subsequently delivered; and, on the 26th of *May* 1836, the Plaintiff received a letter from Mr. *Blunt*, in which, referring to an application made to him by the clerk in Court in the cause of *Heslop* v. *Metcalfe*, the petitioner stated that he (*Blunt*) should proceed no further in that cause, unless the request contained in his letter of the 12th of *February* were complied with before one o'clock on the following day. On receiving this communication, the Plaintiff instructed another solicitor, of the name of *Green*, to take the

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necessary steps for proceeding with the cause. Those steps were accordingly taken, and the cause was afterwards set down for hearing before his Honor the Vice-Chancellor. On the 18th of *October* 1836, *Blunt* commenced an action to recover the amount of his second bill of costs. To this action the Plaintiff put in a plea, on the 13th of *December*, and since that time no further proceedings had been taken in the action.

Pending the proceedings at law, the cause in this Court being likely to be soon in the paper for hearing, the Plaintiff's solicitor, Mr. *Green*, applied by letter to Mr. *Blunt*, requesting him to give up the papers in the suit, upon his (*Green*'s) undertaking to hold them subject to any lien which *Blunt* might have upon them. In reply to that application, Mr. *Blunt* declined to part with any of the papers, alleging that he had a lien upon them for costs of proceedings both in equity and at law; but he offered to allow the Plaintiff or his solicitor to inspect, peruse, and take copies of them at all reasonable times, and offered to undertake to produce them at the hearing. Some further negotiations were afterwards had to induce Mr. *Blunt* to give up the papers in his hands, with a view to their being used at the approaching hearing, but without success; Mr. *Blunt* declining to part with them unless his costs were paid.

The Vice-Chancellor then made an order, upon petition of the Plaintiff, that the briefs of the pleadings in the cause, counsel's opinion thereon, office copy the answers of the several Defendants, and all other deeds and papers, documents and proceedings or connected with the cause, as, upon inspection solicitor might deem to be necessary on the Pl behalf, on the hearing of the cause, should be d over by Mr. *Blunt* to Mr. *Green*, on the latt

his undertaking that they should be received without prejudice to any right of lien, and also that they should be returned, undefaced, to Mr. *Blunt* within ten days after the hearing of the cause.

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An appeal-petition, presented by Mr. *Blunt* against his Honor's order, now came on to be heard.

Mr. *Jacob* and Mr. *Addis*, in support of the appeal.

No case has occurred in which an order, at all similar to the present, has been made, with the exception of *Colegrave* v. *Manley* (*a*), which occurred in the year 1823, and which is at variance with the whole current of authorities both before and since. There, the solicitor had discharged himself by selling his business to another solicitor; and the main question in the cause had reference to the legality of that transaction. The order for the delivery of the papers was, apparently, not much discussed, the question of lien being only a subordinate point. In *Ross* v. *Laughton* (*b*), which occurred in the year 1813, and is the earliest reported case upon the subject, it was not the client, but his assignees, who discharged the solicitor. Lord *Eldon* thought that circumstance made no difference, and held that a solicitor, who was discharged, was bound to produce, but not to deliver up, the papers of his client. The papers there in question were vouchers, that is, original documents, and not, as in the present instance, papers prepared by the solicitor, or copied and made out at his expense. The next case was *Commerell* v. *Poynton* (*c*), where the solicitor had himself declined to proceed, and the order made was of the same kind, for production and inspection only.

In

(*a*) 1 *Turn. & Russ.* 400.
(*b*) 1 *Ves. & B.* 349.
(*c*) 1 *Swan.* 1.

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In *Lord* v. *Wormleighton* (*a*), the solicitor had been discharged by the client; or rather, the executors of the client had declined to continue to employ him; and, at the time of the client's death, the papers in the cause, and the documents and vouchers relating to it, were in the solicitor's hands. Lord *Eldon*, in the course of his judgment, there states his impression to be, that the solicitor "ought to be able to make use of the non-production of the papers, in order to get at what is due to him."

In *Moir* v. *Mudie* (*b*), where the solicitor had discharged himself, the application was for delivery, but the order was limited to inspection merely. In *Twort* v. *Dayrell* (*c*), the Lord Chancellor says, "the party cannot take his papers out of the hands of his solicitor without paying his bill, and the probability is very strong that the party cannot stir a step in the cause without the papers." In *Clutton* v. *Pardon* (*d*), Lord *Eldon* took precisely the same view, although he stated, that where a party had a pressing necessity for papers, the Court would order them to be delivered over, upon a deposit being made sufficient to cover what was due upon the bill and the costs of taxation. No proposal of that kind has been made here.

It is not denied that a large sum is due to Mr. *Blunt*, in respect of his bill of costs; and if the lien exists at all, it is inconceivable that it should be so qualified as it is by the terms of the order appealed from, the effect of which would be to render the lien utterly worthless.

*The*

(*a*) *Jac.* 580.
(*b*) 1 *Sim. & St.* 282.
(*c*) 13 *Ves.* 195.; see p. 197.
(*d*) 1 *Turn. & Russ.* 501.; see p. 304.

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*The* LORD CHANCELLOR (without calling upon Mr. *Wigram*, who was on the other side).

Since this question was first brought on, I have taken the opportunity of looking at all the cases; and I have now to consider whether I will act on *Colegrave* v. *Manley*, or will undo what Lord *Eldon* did in that case. The point was there directly raised, whether, if the Court is of opinion that there should be a production, the order ought to go beyond giving liberty to inspect and take copies. Lord *Eldon*, in his judgment, first considered the question arising upon the sale of his business, by the solicitor; an act which he held to amount to a discharge by the solicitor of himself. His Lordship says, "I look upon Mr. *Raphael* as having dissolved the connection of solicitor and client; for it is not enough that he was willing to superintend the Plaintiff's business. Now, where the solicitor discharges himself, the rule is quite different from what it is where the solicitor is discharged by the client;" and afterwards he adds, "so far as the use of papers is concerned, the suitor, when his solicitor discharges himself, must have his business conducted with as much ease and celerity, and as little expense, as if the connection of solicitor and client had not been dissolved."

Accordingly, the order in *Colegrave* v. *Manley* was almost in the very terms of the present order.

It is true that in several preceding cases, where the solicitor had discharged himself, orders were made, giving to the client the right of inspection only: but it cannot be supposed that Lord *Eldon*, who, with all his experience, had decided *Colegrave* v. *Manley*, in the year 1823, was not acquainted with the prior authorities. In *Cresswell*

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*well* v. *Byron* (*a*), his Lordship intimates, in the form of a doubt, his opinion that a solicitor discharging himself cannot claim a lien; an expression which must be understood as meaning, not that the solicitor loses the lien altogether, but that he cannot set it up so as to prevent the client from proceeding in the cause. And his Lordship's language in *Lord* v. *Wormleighton* (*b*) is to the same effect.

Undoubtedly, that doctrine may expose a solicitor to very great inconvenience and hardship, if, after embarking in a cause, he finds that he cannot get the necessary funds wherewith to carry it on. But, on the other hand, extreme hardship might arise to the client, if, — to take the case which is not uncommon in the smaller practice in the country, — a solicitor, who finds a poor man having a good claim, and having but a small sum of money at his command, may go on until that fund is exhausted, and then, refusing to proceed further, may hang up the cause by withholding the papers in his hands. That would be a great grievance and means of oppression to a poor client, who, with the clearest right in the world, might still be without the means of employing another solicitor. The rule of the Court must be adapted to every case that may occur, and be calculated to protect suitors against such conduct. Now, a solicitor, if he knows that he must trust to the result of the cause for his remuneration, will, of course, be disposed to proceed with it in such a way as, while it promotes the interest of his client, is most likely to render his lien available. I have no doubt, therefore, that the existence of the lien, while it is a great protection to the solicitor against his client, is also

(*a*) 14 *Ves.* 271. (*b*) *Jac.* 580.

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also a great benefit to the client; but the benefit would be entirely lost, if the solicitor might stop short in the middle of the suit, and insist upon retaining the papers, because then no other solicitor could take up and carry on the cause.

It is admitted that, when the solicitor discharges himself, the client and his new solicitor shall, at all events, have free access to inspect and copy the papers at the office of the former solicitor. The mere giving of access, however, is, nine times out of ten, of no practical value; for if the papers are to remain, notwithstanding, in the custody of the solicitor who has discharged himself, it is obvious that they cannot be made use of in the further progress of the suit. The result would be, that the client is to be put to the expense of fresh copies; that fresh briefs must be prepared for counsel; in short, that all the costs arising from making copies of the papers and documents to be used in the cause must be incurred over again, and so the client is to be greatly damnified. That is entirely inconsistent with the *dictum* of Lord *Eldon*, that the suitor must have his business conducted with as much ease and celerity, and as little expense, as if the connection had not been dissolved.

On the other hand, if all that expense be, in fact, incurred by the client, what is the use of the solicitor's lien? There may, indeed, be original papers; but supposing them, as here, to be papers in the cause, the effect of the rule would only be to impose a very great hardship on the client, without any benefit to the solicitor. But if the expense is to operate so as to compel him rather to pay the solicitor's bill than to go to the expense of fresh copies, the admission of access and inspection would be nugatory, and of no value. Now, that a suitor, whose solicitor withdraws himself from the further

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further conduct of a cause, shall be permitted to have the free use of the papers held by that solicitor, so far as they may be required in the prosecution of the cause, is quite consistent with the observations of Lord *Eldon* in *Commerell* v. *Poynton*, and *Lord* v. *Wormleighton*. Those observations, coupled with the express decision to that effect in *Colegrave* v. *Manley*, leave no doubt in my mind as to what Lord *Eldon* considered to be the rule in such cases, and I entirely concur in the propriety of that rule.

It remains only to be considered, whether Mr. *Blunt* must be held to have retired from the performance of his duty as solicitor in this cause. [The Lord Chancellor entered into an examination of the particular facts of the case, as stated in the affidavits, and then continued]: — I cannot but consider that the result of these transactions amounted, on the part of Mr. *Blunt*, to a withdrawing of himself from the office of solicitor for the Plaintiff. I then take the law as laid down by Lord *Eldon*, and, adopting that law, must hold that Mr. *Blunt* is not to be permitted to impose upon the Plaintiff the necessity of carrying on his cause in an expensive, inconvenient, and disadvantageous manner.

I think the principle should be, that the solicitor claiming the lien, should have every security not inconsistent with the progress of the cause. But it is clear that there will neither be, to use the expression of Lord *Eldon*, the same ease and celerity, nor as little expense, in the conduct of it, if the new solicitor is merely to have access to the papers, as where they are placed in his hands, upon his undertaking to restore them after the immediate purposes of the production have been served.

Appeal dismissed with costs.

## KING *v.* BRYANT.

1838.
*Jan.* 27. 31.

A party in contempt is entitled to be heard in Court, to show that proceedings against him subsequent to the order placing him in contempt, have been irregular.

Upon the proceedings under a decree taking the bill *pro confesso* for want of an answer, in a foreclosure suit, the Defendant, notwithstanding he is in contempt, ought to be served with warrants to attend the Master.

An order absolute in the first instance, to confirm the report made under a decree taken *pro confesso*, for want of answer, is irregular.

IN this, which was a foreclosure suit, the Defendant appeared to the bill. Having got into contempt for want of an answer, he was taken upon an attachment, and committed to the *Fleet*. On the 8th of *May* 1837, a decree was made, that the bill should be taken *pro confesso* against the Defendant, and that it should be referred to the Master to take an account of what was due to the Plaintiff for principal and interest on his mortgage, and to tax his costs of the suit; and that, upon the Defendant paying to the Plaintiff what should be reported due for such principal, interest, and costs, within six months from the date of the report, at such time and place as the Master should appoint, the Plaintiff should reconvey the mortgaged premises to the Defendant; or, in default thereof, the Defendant should thenceforth stand absolutely foreclosed. And for the better taking the accounts, the parties were to produce before the Master, upon oath, all deeds, books, &c. relating thereto, and were to be examined upon interrogatories, as the Master should direct, who, in taking the account, was to make to the parties all just allowances; with liberty to either of the parties to apply.

The Plaintiff did not serve the Defendant with any warrants to attend the proceedings before the Master; the whole of which, upon the accounts, therefore, were taken *ex parte*.

By his report, dated the 22d of *July* 1837, the Master certified the sum that was due to the Plaintiff for principal, interest, and costs, and appointed the 22d of

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of *January* 1838, between the hours of eleven and twelve o'clock, at the *Rolls Chapel*, as the time and place of payment. This report was afterwards confirmed by an order, absolute in the first instance, which was not served on the Defendant.

The first information which the Defendant had of the decree and proceedings in the Master's office, was by a letter from the Plaintiff's solicitor, dated the 31st of *August* 1837, and stating the effect of the Master's report.

Upon a petition by the Defendant, stating these facts, (which were verified by affidavit,) alleging certain specific errors in the account, and praying that the order confirming the report might be discharged, and that it might be referred back to the Master to review his report, the Vice-Chancellor dismissed the application, on the ground that the petitioner, not having purged his contempt, had no right to be heard.

The Defendant presented a petition of appeal against his Honor's order.

Mr. *Purvis*, for the Plaintiff, took a preliminary objection to the petition, on the ground that the Defendant was not entitled to be heard, inasmuch as he had not put in his answer, and was still in contempt.

Mr. *Elderton*, in support of the petition.

The Defendant, notwithstanding his contempt, has a right to be heard, to show irregularity in the proceedings against him, before he is absolutely foreclosed. The irregularities he complains of are, first, that the whole of the proceedings upon the account in the Master's office were taken behind his back, the Defendant never

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never having been served with warrants, and having had no notice to attend; and next, that the order, confirming the report, was absolute in the first instance. It appears from the note of a case of *Thompson* v. *Trotter* (*a*), with which I have been furnished by Mr. *Walker*, the Registrar, that a distinction exists in this respect between decrees *pro confesso*, under the statute, for want of appearance, and decrees *pro confesso* for want of answer. In the former, there being no one whom the Plaintiff can serve, all the subsequent proceedings must necessarily be *ex parte*; in the latter, the Defendant having come in and acknowledged the jurisdiction, it is only reasonable that when a decree has been made for an account, the accounting party should be cited to attend before the Master; *Dominicetti* v. *Latti* (*b*), *Daniell's Chancery Practice*. (*c*) And such indeed is the language of this decree, which directs that the parties shall be examined on interrogatories, and shall bring in books and papers upon oath.

*The* LORD CHANCELLOR.

I think the Defendant has a right to be heard to shew irregularity in the proceedings. Let the case stand over to give the Plaintiff's counsel an opportunity of inquiring whether there are authorities for holding that the taking the account *ex parte* in the Master's office, and the order confirming the report absolute at once, were regular. My impression is the other way.

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The petition having been brought on again, *Jan.* 31.

Mr. *Purvis* submitted that the Defendant, being in contempt, could not be heard, except for the purpose of getting

(*a*) 10th *Dec.* 1823, not reported.

(*b*) 2 *Dick.* 588.

(*c*) Vol. i. p. 698.

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getting rid of the order putting him in contempt; and he cited *Beames's Orders* (*a*) *Vowles* v. *Young* (*b*), *Anon.* (*c*), *Odell* v. *Hart* (*d*), *Lord Wenman* v. *Osbaldiston.* (*e*)

[*The* LORD CHANCELLOR. I have already decided that the Defendant is entitled to be heard, to shew that the Plaintiff has been irregular in his mode of prosecuting the decree. The Plaintiff has now to satisfy me that under a decree for taking the bill *pro confesso*, not for want of appearance, but for want of answer, he had a right to go on, without serving the Defendant with warrants, and afterwards to get an immediate order confirming the report absolutely.]

Mr. *Purvis.*

In this case the Defendant has not put in his answer; if he had, the case would have stood in a very different position; for the answer would probably have supplied all the evidence necessary to charge him in the account; and surely he ought not to be placed in a more advantageous situation by reason of his own default. If, under a decree taking the bill *pro confesso*, a Defendant is to have a right, notwithstanding his contempt, to appear and contest the proceedings before the Master, the Plaintiff will be really in a worse situation than if the decree had been made upon a regular hearing, after the Defendant had submitted to give the Plaintiff the benefit of an answer. An order confirming the report absolutely in the first instance may not be usual, according to the present practice, nor have I been able to find a precedent for it; but if the rule be, as I contend, that a Defendant, against whom a decree taking the bill *pro confesso* has been made, has no right to appear

(*a*) Page 55.
(*b*) 9 *Ves.* 172.
(*c*) 15 *Ves.* 174.
(*d*) 1 *Molloy*, 492.
(*e*) 2 *Bro. P. C.* 276. *Toml.* ed.

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appear upon any subsequent proceedings, so long as his contempt is not cleared, an order *nisi* would be an idle form. *Dominicetti* v. *Latti* only proves that under such a decree the Plaintiff is bound to produce some evidence that something was due.

*The* LORD CHANCELLOR.

In this case the Plaintiff, having placed the Defendant in contempt for want of an answer, goes on to take the bill *pro confesso;* he then goes into the Master's office and prosecutes the account *ex parte.* The result is that the Master finds a certain sum to be due, upon which the Plaintiff proceeds, in the ordinary course, to foreclose the estate. What I wanted was to find whether the Plaintiff was regular in that proceeding; because, if the Plaintiff ought to have served warrants on the Defendant, and if he ought to have served him with the order *nisi*, it would be a most unjust extension of the rule against parties in contempt, to take away a man's estate without giving him any opportunity of coming in and protecting himself.

The Court will not hear a party in contempt coming himself into Court to take any advantage of proceedings in the cause; but such a party is entitled to appear, notwithstanding, and resist any proceedings taken against him, and it would be a very easy way of evading that rule if his adversary, instead of giving him notice, were to avoid serving him, and then to say that he could not take advantage of the rule in order to impeach the previous proceedings. However there is no such practice. Supposing that there might be some colour of authority for the course which has been adopted in the present case, I wished the point to be inquired into. It is now admitted that, under the circumstances which have occurrd here, an order confirming the Master's report

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absolutely in the first instance is irregular, and that it ought to be preceded by the order *nisi*. Now, unless the Defendant was entitled to warrants, it would be an absurdity to require the order *nisi* as a preliminary step to the absolute order. The necessity for the order *nisi* assumes that the account before the Master is not to be taken *ex parte*. The Court punishes the Defendant's default, in refusing to answer, by giving to the Plaintiff the benefit of a decree upon the bill as confessed: but there the advantage stops; and when the decree is once pronounced, the subsequent duty of the Court and its officers is to execute that decree in the ordinary way. Accordingly, no authority is to be found in support of the proposition that, upon a decree taking the bill *pro confesso*, and directing an account, the account may be prosecuted *ex parte*. The case of *Dominicetti* v. *Latti* shews that, in the year 1781, the practice was considered to be directly otherwise. It appears from the exceptions in that case, that the Master was not proceeding with the account *ex parte*; for the exceptions state that the Defendant having objected to the allowance of items with which he was charged, the Master called upon the Plaintiff to produce evidence in support of his charge, and the Plaintiff refused, and took exceptions. The question, as appears from the report, was not decided at the moment, but stood over for the purpose of inquiring into the practice; and, upon the result of the inquiry, the exceptions were over-ruled.

The Plaintiff here has miscarried: he has proceeded *ex parte*, when he ought to have proceeded by warrants, and the present application is to protect the Defendant against an order for a foreclosure, obtained upon an irregular report, which can only be considered as a nullity. The costs of the petition must be paid by the Plaintiff, who may set them off, however, against the costs of the contempt.

1838.

## WILSON *v.* BATES.

*March* 10. 28. 30.

A plaintiff is entitled to sue out an attachment against a defendant for want of answer, although he is himself in custody for a contempt in non-payment of costs.

THE bill was filed on the 12th of *April* 1837. On the 17th of *April* a motion, made by the Plaintiff, was refused, with costs, which were afterwards taxed at 11*l.* 18*s.* 6*d.* The Plaintiff having refused to pay those costs, an attachment, dated the 22d of *June* 1837, issued against him. On the 17th of *July* the attachment was lodged with the sheriff of *Leicestershire*, in whose custody the Plaintiff then was. On the 27th of *June* 1837, the time allowed to the Defendants, under the new orders, for answering the Plaintiff's bill, expired. On the 28th of *August*, the Plaintiff gave the Defendants notice that he should sue out an attachment against them for want of an answer: and, on the 20th of *September*, an attachment was sued out accordingly, under which the Defendants were arrested, and thereupon entered into bail bonds. The Plaintiff was then, and still continued to be, detained in the custody of the sheriff of *Leicestershire* at the suit of the Defendants, for non-payment of 11*l.* 18*s.* 6*d.*, the costs of the motion.

The Vice-Chancellor having refused a motion, on behalf of the Defendants, that the attachments against them might be set aside for irregularity, and that the bail-bonds might be ordered to be cancelled, the motion was renewed before the Lord Chancellor, by way of appeal.

Mr. *Wakefield* and Mr. *G. L. Russell*, in support of the motion.

By the seventy-eighth ordinance of Lord *Bacon* (*a*) it is

(*a*) *Beames' Orders*, 35.

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is declared that, "they that are in contempt, especially so far as proclamation of rebellion, are not to be here, neither in that suit, nor any other, except the Court of special grace suspend the contempt." (*a*) Whether this is to be read that a party in contempt shall not be *here*, that is, in Court, or shall not be *heard*, as suggested by Mr. *Beames*, it equally precludes a person in the situation of the Plaintiff from suing out an attachment against defendants in default for want of answer. The attachment is under the seal, and purports to be the order, of the Court; and although, according to the modern course, it is now obtained without motion, the ancient practice was different, as appears from many cases to be found in the old reports, particularly *Cary*, and the book called *Choice Cases; Broomhead* v. *Smith* (*b*): and it still proceeds upon an application made by the party, bringing to the knowledge of the Court the default which is the foundation of the order, and it must be entered in the Registrar's Book before it can issue. To all intents and purposes, therefore, the suing out of an attachment by the Plaintiff was a proceeding in the cause, and a direct violation of Lord *Bacon*'s ordinance. That ordinance is referred to by Chief Baron *Gilbert* (*c*), as declaring the practice. The general rule, as laid down by Lord *Eldon*, is, that parties must clear their contempt before they can be heard; *Vowles* v. *Young* (*d*). A contempt of this kind is not capable of being waived; *Howard* v. *Newman* (*e*), *Gompertz* v. *Best.* (*g*) Upon this point reference has been made for the purposes of the present case to the Clerks-in-Court and to the Registrars. Of the former, thirteen have signed a certificate stating, that, according to what they conceive to be the universal practice, a plaintiff

(*a*) *Beames' Orders*, 35.
(*b*) 8 *Ves.* 357. See p. 359.
(*c*) *For. Rom.* 102.
(*d*) 9 *Ves.* 172.
(*e*) 1 *Moll.* 221.
(*g*) 1 *Yo. & Col.* 619.

plaintiff in contempt cannot sue out an attachment for want of an answer; and the Registrars, with one exception, entertain the same opinion. *Anon.* (*a*), *Hewitt* v. *M'Cartney.* (*b*) Upon a similar principle, the Court, in *Holbrooke* v. *Cracroft* (*c*), and other cases of a like kind, has prevented a plaintiff from pressing for a defendant's answer until he has paid costs awarded against him, by analogy to the practice at law; *Wild* v. *Hobson* (*d*), *Bellchamber* v. *Giani.* (*e*)

Mr. *Bethell, contrà.*

The proposition that if a plaintiff, against whom an attachment has issued for non-payment of costs, has not obtained the defendant's answer, (and indeed whether he has obtained an answer or not, for the argument must be general,) he is unable to take any step in the prosecution of his cause, is new, and, if established, would be a dangerous extension of the ordinary rule with respect to parties in contempt. It would follow that if even any one defendant has obtained an order for payment of costs, and sued out an attachment for non-payment, the plaintiff is put under a ban as to all the defendants. Lord *Bacon*'s ordinance, if construed literally, is not the rule at the present day; for it is perfectly settled that a party in contempt in one cause may, notwithstanding, be heard in another; and that, even in the same cause, he may be heard to defend himself against any proceeding by which his adversary brings him into Court, or in which even the latter has been guilty of irregularity; *King* v. *Bryant.* (*g*)

Lord

(*a*) 15 *Ves.* 174.
(*b*) 15 *Ves.* 560.
(*c*) 5 *Ves.* 706. n.
(*d*) 2 *Ves. & B.* 105.
(*e*) 5 *Mad.* 550. This case was followed by Lord *Brougham* in *Harrington* v. *Long*, 9th *June* 1831, MS.; and see *Killing* v. *Killing*, 6 *Mad.* 68.
(*g*) *Suprà*, p. 191.

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Lord *Bacon*'s ordinance was intended to have reference exclusively to defendants who were in contempt, and not to plaintiffs. At all events, it has never been construed as applicable, in practice, to attachments sued out for want of answer, which, at no period in our legal history, were proceedings in Court, but were always obtained, without motion, on the mere application of the party at the proper office. It appears from entries in the Registrar's book, which has been searched for the purpose, that in *Wild* v. *Hobson* (*a*) the plaintiff, at the time when his cause was brought to a hearing, was actually in contempt to an attachment for non-payment of the costs of two prior motions, in which he had been unsuccessful, and that the payment of those costs was provided for by the decree; and in *Ricketts* v. *Mornington* (*b*) an objection to the hearing of the cause, on the ground that the plaintiff was in contempt, was expressly taken and over-ruled.

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*March* 30.

*The* LORD CHANCELLOR.

The question raised on this application was, whether the Plaintiff, being himself in contempt for non-payment of a sum of money for costs, was entitled to sue out an attachment against the Defendants for not answering the bill: and this, in effect, involved another question, viz. whether, under such circumstances, he could take any step in the cause; for, if he could not compel an answer, of course the cause would be entirely stopped.

No case upon the point was produced; and the argument was mainly grounded upon the seventy-eighth ordinance of Lord *Bacon*. That ordinance, although the foundation of the practice, can only be construed now

(*a*) 4 *Mad.* 49. (*b*) 7 *Sim.* 200.

now by the practice which has since prevailed with reference to it. It is quite obvious that its terms, if strictly acted upon, would produce a very different state of practice from that which is recognised in modern times. If I had to decide upon that in the first instance, and were called upon to settle a rule for future guidance, I certainly never should lay down any such rule. It would seem extraordinary that a party, who may not be able to pay the costs of a refused motion, should be therefore absolutely stopped from asserting his rights. At the same time, if the practice be established, it would not be for me to alter it.

Now, although it may be generally true that a party in contempt cannot be heard to make a motion, he is nevertheless permitted to be heard upon a motion to get rid of that contempt, a case for which, so far as I can see, Lord *Bacon*'s ordinance makes no provision. It is also well settled, that if a party in contempt is brought into Court by any proceedings taken against him, he has a right to be heard in his defence, and in opposition to those proceedings; another case which is inconsistent with Lord *Bacon*'s ordinance, if construed strictly.

The real question, therefore, comes after all to be what is the present practice. Decision, it is admitted, there is none. A certificate, signed by a number of the Clerks-in-Court, has been produced, not alleged to be founded on any authority, but stating the opinion of the individuals who sign it, that a party in contempt cannot do that which the Plaintiff has done in the present instance. The certificate is valuable, no doubt, from the experience of those individuals, speaking to what they consider the universal practice; but no case is referred to in support of the opinion; and if I find that

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that the practice is not and cannot be as they have supposed, its value entirely fails. According to them, if a plaintiff gets into contempt, the cause is absolutely stopped. If that were so, of course a plaintiff in contempt could never bring his cause to a hearing without clearing his contempt. On this point there is not an absence of authority; for in the case of *Wild* v. *Hobson* (*a*) the very question must have arisen. The plaintiff, in the course of that cause, had made two motions to enlarge publication, in both of which, having failed, he was ordered to pay the costs of them, and attachments had issued against him for non-payment. This took place on the 2d and 28th of *November* 1818. Now, according to what the certificate states to be the practice, the first suing out of the attachment put a stop to the plaintiff's further proceedings; there was an end of his power to advance a single step with his cause. Nevertheless, it appears that the cause actually came on for hearing on the 29th of *January* 1819, the plaintiff being then in contempt; and that the costs of his contempt were made matter of arrangement, and were provided for in the decree. (*b*) That at once brings to the test the accuracy of the certificate that a plaintiff in contempt cannot go on. I also find that in the case of *Ricketts* v. *Mornington* (*c*), before the present Vice-Chancellor, the same question arose. There, the plaintiff in contempt brought on his cause to a hearing. According to the certificate, how could he have done it? The Six-clerk who had the management of that cause could not have been aware that the practice was as stated in the certificate. The plaintiff could not have taken

(*a*) 4 *Mad.* 49.

(*b*) The proceedings in the cause of *Wild* v. *Hobson* appeared from entries in the Registrar's Book for the year 1818, B. fols. 20. 201. and 490. with extracts from which the Lord Chancellor was furnished by Mr. *Colville*, one of the Registrars.

(*c*) 7 *Sim.* 200.

taken a single step, according to the terms of Lord *Bacon*'s ordinance, whether it be read "here" or "heard;" and yet when the cause came on for hearing, although a party in contempt, and therefore not to be heard, here he was, asking a decree. It was objected that he could not do so because he was in contempt; but the Vice-Chancellor over-ruled the objection, and he *was* heard; and that decision has been acquiesced in. So much for what is said to be the universal practice of not permitting a plaintiff to go on under such circumstances. Universal, certainly it is not; for here are two reported cases in which the particular facts stated shew a course of proceeding adopted, incompatible with the practice alleged by the certificate to prevail.

The question has also been raised indirectly in other cases, — in those cases, I mean, in which, the plaintiff being in contempt, the defendant has applied to the Court to stay further proceedings until the costs of the contempt shall have been paid. If the circumstance of a plaintiff being in contempt of itself puts an end to his power of proceeding, that would be an unnecessary and useless step on the defendant's part. Instead of that, the defendant would be content to remain passive and quiescent. Such, however, is not the course taken by parties litigant, or sanctioned by the practice of the Court: the course is, for the Court, upon a motion for that purpose, and not before, to make an order staying the proceedings until the plaintiff has paid the prior costs; that is to say, it makes a special order. In *Eddowes* v. *Neville*, before Lord *Hardwicke*, according to the note with which I have been furnished by the Registrar (*a*), the defendant moved that all proceedings under a writ of

(*a*) Mr. *Colville*.

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of execution of the decree might be suspended until the plaintiff should have paid certain costs, for non-payment of which she was in prison; and the Attorney-General, on behalf of the plaintiff, thereupon applied that an attachment might issue against the defendant: and the Court made a special order, adjudicating upon the whole matter. So, in another case of *Price* v. *Dalton* (*a*), before the same Judge, upon a motion by the defendant that all proceedings for want of answer might be stayed until the plaintiff had paid certain costs, the Court gave the defendant three weeks' time to answer, after the costs should have been paid. These cases clearly recognise the propriety of the application to stay proceedings; and they tend to shew, moreover, that though a plaintiff may be in contempt to an attachment, he has still a right to the process of the Court to compel an answer, or to prosecute his suit, if the defendant does not apply specially that proceedings may be stayed.

In the absence of all authority to support the proposition contended for, and with the cases I have referred to, which, though not expressly in point, are in direct contradiction to the statement in the certificate, and having no disposition whatever to extend the practice of the Court in the construction of Lord *Bacon's* ordinance beyond what I find to be established, I am of opinion that the Vice-Chancellor was right in what he has done, and the motion must therefore be refused.

(*a*) *July* 1745.

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*June* 23.
*July* 4. 6, 7. 29.

A negative plea, which professes to be a plea to the whole bill, except certain specified parts, but yet proceeds to traverse some one of the parts so excepted, is bad.

THE bill, which was filed by Sir *George William Denys*, Bart., against *Charles Locock*, Sir *Francis Shuckburgh*, and Dame *Anna Maria Draycott Shuckburgh* his wife, and other persons, stated that the Plaintiff's father, *Peter Denys*, and Lady *Charlotte* his wife, had, besides the Plaintiff, two children only, viz. *Charlotte Denys*, who died in the year 1815, unmarried, and the Defendant Lady *Shuckburgh*.

The bill stated the purport of the will of *Peter Denys*, who died in the year 1816, and also of the will of Lady *Charlotte Denys*, dated in the year 1822, by which, amongst other benefits given to Lady *Shuckburgh*, the testatrix bequeathed to her the dividends of all the capital sums which should at her (the testatrix's) death be standing in her name, in any of the public stocks or funds, for her use during her life, with remainder to daughters, and in default of daughters, to sons of Lady *Shuckburgh*, in manner particularly mentioned in the bill; and in case Lady *Shuckburgh* should not leave any daughter or son living at the time of her death, or all of them should die under the age of twenty-one years, without leaving any child surviving, then the testatrix bequeathed the capital sums to such persons, and in such manner, in all respects, as Lady *Shuckburgh* by her will should appoint; and, in default of such appointment, to the executors and administrators of Lady *Shuckburgh*, to be applied as the law should direct: and that the testatrix gave all the residue of her estate and effects, real or personal, to Lady *Shuckburgh*, her heirs, executors, administrators, and assigns.

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The bill went on to state that at the date of the will of *Peter Denys*, the annual value of the whole property in which it was intended by such will that the Plaintiff should take an interest under the same, supposing (as proved to be the case) that the powers thereby given to Lady *C. Denys* should not be exercised by her, did not exceed 1300*l.*; and that the annual value of the property in which it was, upon the like supposition, intended by the same will, that Lady *Shuckburgh* should take an interest under the same, was 3000*l.* at the least:

That at the date of the will of Lady *C. Denys*, the annual value of the property in which it was intended by her will that the Plaintiff should, upon her decease, take an interest under that will, and under the will of *Peter Denys*, did not altogether exceed 1350*l.*; and that the annual value of the property in which it was intended by such will, that Lady *Shuckburgh* should, upon the death of Lady *C. Denys*, take an interest under the two wills, exceeded 6500*l.*, independently of the furniture and works of art at the *Pavilion*, which was the place of Lady *C. Denys*'s residence, and certain plate and jewels; and which works of art, plate, and jewels were stated in the bill to be worth very large sums of money, which were specified.

The bill then stated certain circumstances, as shewing that, at the respective dates of the two wills before mentioned, it was expected by all the members of the *Pomfret* family, and of the Plaintiff's own family, that at the death of *George* Earl of *Pomfret* and of his brother Lieutenant General the Honourable *Thomas William Fermor*, who afterwards became Earl of *Pomfret*, the estates of the *Pomfret* family would devolve upon the Plaintiff, under the limitations of a settlement to which those estates were subject. It also stated certain benefi

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and allowances conferred on the Plaintiff, or promised to him, by *George* Earl of *Pomfret* and *Thomas William Fermor*, including an allowance of 500*l.* per annum, made to him by *George* Earl of *Pomfret*; and then proceeded to state that it was in consequence of the circumstances before referred to, and by reason of the Plaintiff's before mentioned expectations, that the dispositions made in favour of Lady *Shuckburgh* by the will of *Peter Denys* were so made; and that it was in consideration of the same circumstances, but yet at the suggestion and by the desire of Lady *Shuckburgh*, that the dispositions made in fayour of Lady *Shuckburgh*, by the will of Lady *C. Denys*, were so made thereby.

The bill then went on to allege that, after the death of *Peter Denys*, Lady *Charlotte Denys*, up to the time of her death, resided at the *Pavilion*: that Sir *Francis* and Lady *Shuckburgh* were married in *October* 1825, and that after the death of *Peter Denys*, Lady *Shuckburgh*, before her marriage, and Sir *Francis* and Lady *Shuckburgh*, after their marriage, resided with Lady *C. Denys*, until her death: that Lady *Shuckburgh* from her earliest years had been a person of violent temper and of a determined will, and that Lady *C. Denys* from her early years was always a person of an excitable temperament, but of a kind and yielding disposition, and unable to combat opposition; and that, after the death of *Peter Denys*, Lady *Shuckburgh*, before her marriage, and Sir *Francis* and Lady *Shuckburgh*, from the time of their marriage, assumed and took a principal part in the management and direction of the household affairs of Lady *C. Denys*; and that Lady *Shuckburgh* acquired great ascendancy and control over Lady *C. Denys*; and that, previously to and at the date of Lady *C. Denys*'s will, such ascendancy and control had become and were extremely great; — and that they afterwards increased; and that from about some time in the year 1830,

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1830, Lady *C. Denys* became so wholly subjected the influence and control of Lady *Shuckburgh*, that s was unable in anything to oppose her wishes:

That, at the date of Lady *Charlotte Denys*'s will, s was in her fifty-sixth year, and Lady *Shuckburgh* in h thirtieth year; and that Lady *Shuckburgh* had previou s conceived a jealousy of the Plaintiff, in respect of La *C. Denys*'s property, and that she had obtained a promi from Lady *C. Denys* that she would leave all her per sonal property to her (Lady *Shuckburgh*), and that th will and the dispositions therein contained were mad and framed at the suggestion of Lady *Shuckburgh*, an in compliance with her wishes; and that, after the wil had been made, Lady *Shuckburgh* became jealous les any part of the benefits thereby given to her should b taken away from her by any subsequent disposition; an that she formed a secret resolution and design that, b means of her influence and control over Lady *C. Denys* she would prevent any such subsequent disposition m her prejudice being made; and that, in prosecution o such design, Lady *Shuckburgh*, soon after the date of th will, obtained from Lady *C. Denys* a renewal of he promise to leave all her personal property to her:

That in the year 1823, *Thomas William* Earl of *Pomfret*, then *Thomas William Fermor*, unexpectedly married, and that in *December* 1824 he had a son, the present Earl, and had since had another son; and that, by the birth of such sons, the Plaintiff's expectations of succeeding to the *Pomfret* estates were defeated: that *George* Earl of *Pomfret* had an absolute power of disposition over other property of considerable value; that he had always shown great kindness and affection for the Plaintiff, and that he continued the allowance of 500*l.* per annum to the Plaintiff, notwithstanding his brother's marriage;

marriage; and that it was always expected, by the Plaintiff, and also by Lady *C. Denys*, that some considerable provision would be made for the Plaintiff by the will of *George* Earl of *Pomfret*; and that Lady *C. Denys* made no alteration in her will before his death, which happened in the beginning of the month of *April* 1830; and that it then appeared that his will contained no provision whatever in favour of the Plaintiff or of the Plaintiff's family, and that, before his death, his successor (*Thomas William*) had made it known that he had changed the intention which he had previously entertained of leaving to the Plaintiff an estate called *Twinstead Hall*, in *Essex*:

That the Plaintiff married in the year 1809, soon after he was of age, and had had nine children, of whom eight were living.

The bill then stated circumstances, shewing that, at the time of the death of *George* Earl of *Pomfret*, the Plaintiff had very little property besides that which has been already mentioned, and that he was involved in debt, and that Lady *C. Denys* was fully acquainted with his circumstances, and that, from the time of his birth to the time of his mother's (Lady *C. Denys*'s) death, she was always devotedly attached to him, and that the kindest feeling and warmest affection uninterruptedly subsisted between them; and that after the death of *George* Earl of *Pomfret* she became extremely anxious that some provision should be made for the Plaintiff beyond the means and expectations he then had, and that she frequently expressed such anxiety, but in the absence, and without the knowledge of Lady *Shuckburgh*; and that, on the 1st of *May* 1831, she wrote a letter (stated in the bill) to *Thomas William* Earl of *Pomfret*, who had continued to the Plaintiff the

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500*l.* per annum, entreating him to make some provision for the Plaintiff after his death:

That Lady *C. Denys* made two codicils to her will, of which the first bore date the 19th of *May* 1831, and by which, amongst other things, she appointed *Charles Locock* and Lady *Shuckburgh* executor and executrix of her will, together with another person whose appointment was afterwards revoked; and that, by the second codicil, which was dated the 20th of *August* 1832, Lady *C. Denys* revoked that part of her will by which, after the death of Lady *Shuckburgh*, she had given all the capital sums standing in her name in any of the public stocks in manner therein mentioned; and gave the said stocks and funds, after the death of Lady *Shuckburgh*, to such one or more of the child or children of Lady *Shuckburgh*, or the issue of any deceased child or children, in such manner in all respects as Lady *Shuckburgh* should, in manner therein mentioned, appoint, and in default of such appointment, unto the child or children of Lady *Shuckburgh*, equally to be divided between them, if more than one; the shares to be vested at twenty-one, and if any such child should die under twenty-one, without leaving any child or children, the share of such child to go to the survivors or survivor; and if any such child should die under twenty-one, leaving any child or children, then such child or children to be entitled to the share which his, her, or their deceased parent would have been entitled to, if he, she, or they had lived to attain the age of twenty-one years; and in case Lady *Shuckburgh* should not leave any child or children living at her decease, or all of them should die under twenty-one without leaving any issue, him or her surviving, then the testatrix bequeathed the said stocks and funds in such manner as by her will the same were in such event bequeathed:

That

That *Thomas William* Earl of *Pomfret* died on the 29th of *June* 1833, without having made any provision for the Plaintiff, and that, on his death, the Plaintiff's allowance of 500*l.* per annum, ceased:

That at the time of the death of *Thomas William* Earl of *Pomfret* Lady *C. Denys* was, and up to the time of her death continued to be, possessed of a sum of 10,000*l.* new 3½ per cent. Bank annuities, standing in her name:

That on the 2d of *August* 1833, Lady *C. Denys* made a codicil, by which she gave the interest and dividends of 10,000*l.* 3½ per cent. Bank annuities, then standing in her name, and also the interest and dividends of any further or other stock in the 3½ per cent. annuities which she might thereafter add thereto, unto the Plaintiff, for his life; and after his decease she gave the 10,000*l.* 3½ per cent. Bank annuities, and any further or other stock in the 3½ per cent. Bank annuities, which she might thereafter add thereto, unto all and every or such one or more of the children of the Plaintiff, and in such shares, and at such times, and in such manner and form, as he should by deed or will appoint; and, subject thereto, to all his children equally, the shares of sons being vested at the age of twenty-one, and the shares of daughters being vested at that age or at the time of marriage, with benefit of survivorship:

That Lady *C. Denys* never had any stock or property to which the expressions used in this codicil could refer, except the 10,000*l.* new 3½ per cent. Bank annuities before mentioned:

That the execution of this codicil was concealed from Lady *Shuckburgh* by Lady *C. Denys*, and also, by her direction, by the two witnesses who attested it; but that

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one of those witnesses, *Eliza Couch* (the lady's maid of Lady *C. Denys*), afterwards disclosed to Lady *Shuckburgh* the fact of the execution of that codicil, but could not inform her of its nature or effect, further than that it was in favour of the Plaintiff; and that Lady *Shuckburgh* then used reproaches and violent expressions to Lady *C. Denys*, who was at that time extremely ill, and recovering from a recent attack of paralysis, and was unable to speak without great difficulty; and that Lady *Shuckburgh* afterwards ascertained the exact nature of the codicil which had been executed:

That, on the 12th of *March* 1834, Lady *C. Denys* made another codicil, by which she revoked so much of the previous codicil as had given the 10,000*l.* 3½ per cent. Bank annuities, after the death of the Plaintiff, to his children; and directed that, after his death, that sum, and any additions she might make to it, should fall into the residue of her estate: that Lady *C. Denys* was induced to execute the codicil of the 12th of *March* 1834 wholly through the influence of Lady *Shuckburgh*, and through fear of her: that by a codicil of the 29th of *March* 1834, Lady *C. Denys* (amongst other things) revoked the codicils of the 2d of *August* 1833 and the 12th of *March* 1834, and directed that her executor and executrix should, out of the sum of 10,000*l.* 3½ per cent. Bank annuities, standing in her name, raise the sum of 3600*l.*, and such further or other sum of money as should be necessary to redeem two annuities, granted by the Plaintiff, of 170*l.* 7*s.* and 189*l.*, and all arrears of those annuities, and all the expences of redemption; and that the annuities should be redeemed accordingly: that, by a codicil of the 14th of *April* 1835, she revoked so much of her codicil of the 29th of *March* 1834 as directed her executor and executrix, by sale of a competent part of the sum of 10,000*l.* 3½ per

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per cent. Bank annuities, standing in her name, to raise the sum of 3600*l.*, and such further or other sum of money as should be necessary to redeem the two annuities before mentioned; and she revoked the direction to redeem those annuities, and directed that her executor and executrix should, if found necessary, and if and when convenient to Lady *Shuckburgh*, pay those annuities for one or two years after her (Lady *C. Denys*'s) decease, at the discretion of Lady *Shuckburgh*; and that Lady *Shuckburgh* should, at any time during her life, and notwithstanding her coverture, be at liberty to sell or transfer the said 10,000*l.* 3½ per cent. Bank annuities, or any part thereof, and to apply the same, or the money to be produced by such sale, as she might think proper; but if the Bank annuities should not be sold or transferred by Lady *Shuckburgh* in her lifetime, then the same, or such part as should not be sold or transferred, and the dividends and interest, should be applied in such manner as by Lady *C. Denys*'s will and a former codicil thereto were mentioned, respecting the sums standing in her name in any of the public stocks or government funds of this kingdom:

That Lady *C. Denys* executed as well the codicils of the 29th of *March* 1834 and the 14th of *April* 1835, as the paper writing of the 12th of *March* 1834, at the suggestion of Lady *Shuckburgh*; and that she was, in fact, induced to execute all of them by the exercise of undue and improper influence and control over her on the part of Lady *Shuckburgh*, and that she never would have executed any of them but for the exercise of such influence and control; that Lady *C. Denys* was extremely unwilling to execute the paper writing of the 12th of *March* 1834, and the codicils of the 29th of *March* 1834 and the 14th of *April* 1835; and that in order to

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induce her so to do, Lady *Shuckburgh*, previously to the execution of the same instruments respectively, and, in particular, previously to the execution of the codicils of the 29th of *March* 1834 and the 14th of *April* 1835, from time to time represented to Lady *C. Denys* that she (Lady *Shuckburgh*) had always intended, out of the benefits which she was to derive under the will and codicils of Lady *C. Denys*, to make some considerable provision for the Plaintiff and his family; and that, before the execution of the codicil of the 14th of *April* 1835, Lady *Shuckburgh*, expressly and in terms, promised Lady *C. Denys* that if she would, as she (Lady *Shuckburgh*) desired, execute that codicil, she (Lady *Shuckburgh*) would apply the said sum of 10,000*l.* stock for the benefit of the Plaintiff and his children, according to the provisions of the paper writing of the 2d of *August* 1833: that Lady *C. Denys* believed such representations and promises of Lady *Shuckburgh*, and that she executed the paper writing of the 12th of *March* 1834, and also both the codicils of the 29th of *March* 1834 and the 14th of *April* 1835, and particularly the last-mentioned codicil, in reliance on the truth of such representations, and on the faith of the said promises:

That Lady *C. Denys* died on the 17th of *November* 1835, and that on the 30th of *December* 1835, her said will, together with the four codicils of the 19th of *May* 1831, the 20th of *August* 1832, the 29th of *March* 1834, and the 14th of *April* 1835, without any other instrument, were proved, in common form, in the Prerogative Court of Canterbury, by *Charles Locock* and by Lady *Shuckburgh*, with the privity and approval of Sir *Francis Shuckburgh*; and that the personal property of Lady *C. Denys* was then sworn at 80,000*l.*, and that her debts did not amount to 1000*l.*, and that her personal assets,

assets, not specifically bequeathed, were greatly more than sufficient to pay her funeral and testamentary expences and debts:

That, notwithstanding the representations and promises made by Lady *Shuckburgh* to Lady *C. Denys*, Sir *Francis* and Lady *Shuckburgh* claimed the said sum of 10,000*l.*, 3½ per cent. Bank annuities, for their own benefit.

The bill then proceeded to charge, as evidence of the truth of the matters thereinbefore stated and set forth, various circumstances tending to shew Lady *C. Denys*'s great and unabated affection for the Plaintiff, and her anxious desire to make further provision for the Plaintiff, and particularly to settle the 10,000*l.* stock, beforementioned, upon the Plaintiff; and that Lady *Shuckburgh* had frequently made representations and statements to Lady *C. Denys*, to the prejudice of the Plaintiff, and which had the effect of preventing Lady *C. Denys* from making him presents which she had designed for him; and that Lady *Shuckburgh* discouraged the Plaintiff's visits to Lady *C. Denys*; and, whenever he did visit her, used to prevent his being left alone with her, and, in fact, that he was never, after the death of his father (*Peter Denys*), suffered by Lady *Shuckburgh* to be alone with Lady *C. Denys*, although he often called upon her, and remained for several hours at a time: and that Lady *Shuckburgh*, from the year 1830, always kept a watch over Lady *C. Denys*, to prevent her making any disposition of her property without her (Lady *Shuckburgh*'s) knowledge; and that Lady *Shuckburgh* was accustomed to use harsh language and conduct towards Lady *C. Denys*, whenever she opposed Lady *Shuckburgh*'s wishes, and to modify her conduct and shew

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greater kindness to Lady *C. Denys* when she complied with her wishes: and that that mode of proceeding was a certain mode of acquiring influence and control over Lady *C. Denys;* and that the Plaintiff, from the time of his father's death until the year 1832, resided about fifty miles from *London*, and that in the year 1832 he went to reside in *France*, and never more saw Lady *C. Denys*, which circumstance facilitated Lady *Shuckburgh*'s control over her; and that in the year 1831 Lady *Shuckburgh* induced Lady *C. Denys* to give her all her plate, jewels, ornaments, and trinkets, which were worth 10,000*l.* at least; and that, soon after the month of *March* 1834, Lady *C. Denys* was persuaded by Lady *Shuckburgh* to execute a deed of gift, giving her all the furniture, works of art, and pictures at the *Pavilion*, which were worth at least 20,000*l.*: and that both the codicils of the 29th of *March* 1834, and the 14th of *April* 1835, were made at the suggestion of Lady *Shuckburgh;* and that the contents and effect thereof were suggested by her; and that she gave instructions or directions for the same to *Henry Francis* (Lady *C. Denys*'s solicitor), and that he received his instructions or directions for the same from her.

The bill also charged, that the truth of the matters mentioned in the bill would appear, if the Defendants would state and set forth, as they were able and ought to do, with whom the idea or design of the alleged codicil of the 14th of *April* 1835 originated, and whether the idea or design of the same did not, in truth, originate with Lady *Shuckburgh*, and whether such codicil, or the contents or effect thereof, or some part of such contents, were not in the first instance suggested by Lady *Shuckburgh* to Lady *C. Denys;* and how and under what circumstances it happened that

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Lady *C. Denys* came to desire, or was led to make, such codicil, if she ever desired so to do; and at what precise time or times Lady *C. Denys* first conceived, if she ever did conceive, the design of making such codicil; and at what precise time or times, and to whom and in whose presence, Lady *C. Denys* first gave, if ever she did give, directions for preparing the last-mentioned codicil: with a number of other minute inquiries having the same object.

The bill contained a similar charge as to the codicil of the 12th of *March* 1834, and the codicil of the 29th of *March* 1834.

The bill charged, as further evidence of the matters therein mentioned, that, before the execution, by Lady *C. Denys*, of the paper writing of the 12th of *March* 1834, the alleged codicil of the 29th of *March* 1834, and the alleged codicil of the 14th of *April* 1835, respectively, Lady *Shuckburgh* frequently represented and stated to Lady *C. Denys*, that she (Lady *Shuckburgh*) intended, by and out of the benefits which she was to derive from Lady *C. Denys*, to make some considerable provision for the Plaintiff and his family; and that, before the execution of the alleged codicil of the 14th of *April* 1835, she expressly promised Lady *C. Denys* that if she would, as she (Lady *Shuckburgh*) desired, execute such codicil, she would hold the said sum of 10,000*l.* new 3½ per cent. Bank annuities, and the dividends thereof, upon trusts to correspond with the intention expressed in and by the said paper writing of the 2d of *August* 1833; and that Lady *C. Denys* believed and confided in such representations and promises, and executed the said paper writing and codicils respectively in the belief of such representations, and on the faith of such promises respectively.

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The bill stated and charged a very great variety of circumstances, tending to shew that the mind and body of Lady *C. Denys*, at the time of the execution of the three last-mentioned documents, were in an extremely feeble state; and that Lady *Shuckburgh* had, by threats and intimidation, and other violent demeanour, obtained an absolute control over Lady *C. Denys:* and the bill charged that the circumstances therein stated, as proving or tending to prove the state of mind of Lady *C. Denys*, and the influence exercised over her by Lady *Shuckburgh*, formed a material link in the evidence by which the Plaintiff was able and intended to prove the before-mentioned representations and promises to have been made.

The bill charged, as further evidence of the matters therein-mentioned, that the Defendants respectively had, at various times, written letters to, or had other written communications with, each other, and with various other persons, and had, at various times, received letters or other written communications from each other, and from various other persons, touching, or concerning, or relating to the matters mentioned in the bill, or some of them, or which it would be advantageous for the Plaintiff to see, with reference to his claim in this suit. The bill particularised, amongst other things, various letters relating to the codicil of the 14th of *April* 1835.

The bill also charged, that the Defendants had now, or once had, in the custody, possession, or power of themselves or their attorneys, solicitors, or agents, among other documents, certain drafts of the codicil of the 29th of *March* 1834, certain fair copies of such drafts, certain instructions for the codicil of the 14th of *April* 1835, certain memoranda relating to the same, and whereby, if produced, the truth of the matters mentioned in the bill would appear.

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The Defendants to the bill were *Charles Locock*, Sir *Francis* and Lady *Shuckburgh*, and *Eliza Couch*, who was alleged to have confederated with Lady *Shuckburgh* in such manner as to make her liable for the costs of the suit. The children of the Plaintiff and of Sir *Francis* and Lady *Shuckburgh* were also made Defendants, as claiming an interest.

The prayer of the bill was, that it might be declared that the said sum of 10,000*l.* new $3\frac{1}{2}$ per cent. Bank annuities, and the dividends thereof, as from the death of Lady *C. Denys*, were subject to a trust corresponding to the directions and provisions of the paper writing of the 2d of *August* 1833, and that proper persons might be appointed trustees of that sum of stock, and that the same might be transferred into the names of such trustees, and that Sir *F.* and Lady *Shuckburgh* might be decreed to account for the dividends of the stock, as from the death of Lady *C. Denys;* or otherwise that the rights of the Plaintiff in the stock and dividends might be ascertained and declared, and all proper directions given with respect to the same: and that *Locock* might be declared liable to be decreed to make good to the Plaintiff any loss which might be sustained by reason or in consequence of the stock having been, or being thereafter, transferred into the names of Sir *F.* and Lady *Shuckburgh;* and that, pending the suit, *Locock* and Sir *F.* and Lady *Shuckburgh* might be restrained by injunction from transferring or disposing of the stock, and that the same and the accruing dividends might be secured during the pendency of the suit; and that the Plaintiff might be paid his costs of, and incidental to, the suit, by Sir *F.* and Lady *Shuckburgh;* and that *Eliza Couch* might be declared also liable to make good to the Plaintiff such costs, and might also be decreed to pay the same.

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To this bill the Defendants, Sir *Francis* and Lady *Shuckburgh*, put in a plea and answer, in the following form: —

"These Defendants, by protestation, not confessing or acknowledging all or any of the matters and things in and by the Plaintiff's bill mentioned to be true, in such manner and form as the same are therein and thereby set forth and alleged, as to all the discovery and relief sought from and prayed against these Defendants or either of them, other than and except so much of the said bill as seeks a discovery from these Defendants, whether, in order to induce Lady *C. Denys*, in the said bill named, to execute the paper writing and codicils in the said bill in that behalf mentioned respectively, or some or one and which of them, this Defendant, Dame *Anna Maria Draycott Shuckburgh*, did not, previously to the execution of the same instruments respectively, and whether or not in particular, before the execution of the codicils in the said bill in that behalf mentioned, or when else, from time to time, or at some and what time, represent to the said Lady *C. Denys*, that she, this Defendant, Dame *A. M. D. Shuckburgh*, had always intended, out of the benefits which she was to derive under the will and codicils of the said Lady *C. Denys*, to make some considerable provisions for the said complainant and his family, or how otherwise; and whether, before the execution of the codicil of the 14th day of *April* 1835, in the said bill in that behalf mentioned, she, the said Lady *Shuckburgh*, expressly, and in terms, promised the said Lady *C. Denys*, that if she would, as she, the said Lady *Shuckburgh* desired, execute the last mentioned codicil, she would apply the sum of 10,000*l.* stock for the benefit of the said complainant and his children, according to the provisions of the paper writing of the 2d day of *August* 1833, in the said bill in that behalf mentioned

tioned, or to some and what other purport or effect; and whether the said Lady *Charlotte Denys* did not believe such representations and promises of the said Lady *Shuckburgh* in the bill alleged, or how otherwise; and whether the said Lady *C. Denys* did not execute the paper writing and the codicils in the said bill in that behalf mentioned, or some or one and which of them; and whether or not, particularly, the codicil in the said bill in that behalf mentioned, in reliance on the truth of such alleged representations, and on the faith of the said alleged promise, or how otherwise; and whether, before the execution by the said Lady *C. Denys* of the paper writing of the 12th of *March* 1834, in the said bill in that behalf mentioned, the alleged codicil of the 29th day of *March* 1834, in the said bill in that behalf mentioned, and the alleged codicil of the 14th of *April* 1835, in the said bill in that behalf mentioned respectively, the said Lady *Shuckburgh* frequently represented and stated to the said Lady *C. Denys*, that she, the said Lady *Shuckburgh*, intended by and out of the benefits which she was to derive from the said Lady *C. Denys* to make some considerable provision for the said complainant and his family; and whether, before the execution of the said alleged codicil of the 14th of *April* 1835, she (meaning this Defendant, Dame *A. M. D. Shuckburgh*,) expressly promised to the said Lady *C. Denys* that if she would, as the said Lady *Shuckburgh* desired, execute such codicil, she would hold the sum of 10,000*l.* new 3*l.* 10*s.* per cent. Bank annuities, and the dividends thereof, upon trusts, to correspond with the intention expressed in and by the said paper writing of the 2d day of *August* 1833, in the said bill in that behalf mentioned; and whether the said Lady *C. Denys* believed and confided in such representations and promises in the said bill alleged; and whether she executed the said paper writing and codicils respectively in

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in the belief of such alleged representations, and on the faith of such alleged promises respectively; and whether the state of mind of the said Lady *C. Denys*, and the alleged influence which the said Lady *Shuckburgh* had acquired over her, had operated as a principal inducement with the said Lady *Shuckburgh* to attempt to procure the execution of the paper writing of the 12th day of *March* 1834, in the said bill mentioned in that behalf, and of the codicils of the 29th day of *March* 1834, and the 14th day of *April* 1835, in the said bill mentioned in that behalf, by means of the alleged representations and promises in the said bill in that behalf mentioned; and whether the said Lady *Shuckburgh* sometimes used her alleged influence and control over the said Lady *C. Denys*, as a preliminary step to the introduction of the said alleged representations and promises; and whether sometimes as a mode of giving force and effect to the same with the said Lady *C. Denys;* and whether the said alleged circumstances, in the said bill in that behalf stated, as proving or tending to prove the state of mind of the said Lady *C. Denys*, and the alleged influence exercised over her by the said Lady *Shuckburgh*, form a material link in the evidence by which it is, by the said bill, alleged, that the said complainant is able, and intends to prove, the said alleged representations and promises to have been made; and whether all the alleged representations and promises of the said Lady *Shuckburgh*, in the said bill in that behalf stated and set forth, were made and done by her in all respects with the privity and approval of the said Sir *Francis* and Lady *Shuckburgh*, and so far as the same were subsequent to the alleged discovery by her of the alleged paper writing of the 2d of *August* 1833, in concert and collusion also with *Eliza Couch* in the said bill named: — Do plead in bar; and for plea say they deny, that before the execution of the codicil of the 14th of *April* 1835, in the said bill

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bill in that behalf mentioned, or at any time she, this Defendant Dame *A. M. D. Shuckburgh*, expressly and in terms or in any manner promised, represented, or stated to Lady *C. Denys*, in the said bill named, that if she would execute the said last mentioned codicil, she, this Defendant Dame *A. M. D. Shuckburgh*, would apply the sum of 10,000*l.* stock, in the said bill mentioned, or any part thereof, for the benefit of, or hold the same or any part thereof upon trust for, the said complainant and his children, or any or either of them, according to the provisions of the paper writing of the 2d day of *August* 1833, in the said bill mentioned, or according to any other provisions, or in any other manner. All which matters and things these Defendants aver to be true, and are ready and willing to prove, as this honorable Court shall award. And these Defendants plead the same in bar to the whole of the said bill, except such parts as aforesaid, and do humbly pray the judgment of this honorable Court, whether they shall be compelled to make any further or other answer to so much of the said complainant's said bill as they have before pleaded to, and pray to be dismissed in respect thereof, with their costs and charges in this behalf sustained.

"And these Defendants, not in any sort waiving their said plea, but wholly relying thereon, do, for answer to so much of the said complainant's said bill as these Defendants have not pleaded to, or to so much and such parts thereof as these Defendants are advised it is material or necessary for them to make answer unto, answering say, they and each of them deny, that in order to induce Lady *C. Denys*, in the said bill named, to execute the paper writing and codicils in the said bill in that behalf mentioned respectively, or any or either of them, this Defendant, Dame *A. M. D. Shuckburgh*, did, previously to the execution of the same instruments respectively,

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spectively, or in particular before the execution of the said codicils in the said bill in that behalf mentioned, or at any time from time to time represent to the said Lady *C. Denys* that she, this Defendant *A. M. D. Shuckburgh*, had always intended, out of the benefits which she was to derive under the will and codicils of the said Lady *C. Denys*, to make some considerable provision for the said complainant and his family, or otherwise; or that before the execution of the codicil of the 14th day of *April* 1835, in the said bill in that behalf mentioned, she, this Defendant Dame *A. M. D. Shuckburgh*, expressly, and in terms, promised the said Lady *Charlotte Denys*, that if she would, as she, this Defendant Dame *A. M. D. Shuckburgh*, desired, execute the last-mentioned codicil, she would apply the sum of 10,000*l.* stock for the benefit of the said complainant and his children, according to the provisions of the paper writing of the 2d day of *August* 1833, in the said bill mentioned, or to any other purport or effect; or that the said Lady *Charlotte Denys* did believe such alleged representations and promises of this Defendant, Dame *A. M. D. Shuckburgh*, or otherwise; or that the said Lady *C. Denys* did execute the paper writing and the said codicils in the said bill in that behalf mentioned, or some or one of them, or particularly the codicil in the said bill in that behalf mentioned, in reliance on the truth of such alleged representations, and on the faith of the said alleged promise or otherwise; or that before the execution, by the said Lady *C. Denys*, of the paper writing of the 12th day of *March* 1834, in the said bill in that behalf mentioned, the codicil of the 29th day of *March* 1834, in the said bill in that behalf mentioned, and the codicil of the 14th of *April* 1835, in the said bill in that behalf mentioned respectively, this Defendant, Dame *A. M. D. Shuckburgh*, frequently represented and stated to the said Lady *C. Denys*, that she, this Defendant Dame *A. M. D.*

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*A. M. D. Shuckburgh*, intended, by and out of the benefits which she was to derive from the said Lady *C. Denys*, to make some considerable provision for the said complainant and his family; or that, before the execution of the codicil of the 14th day of *April* 1835, this Defendant, Dame *A. M. D. Shuckburgh*, expressly promised the said Lady *C. Denys*, that if she would, as it is alleged this Defendant Dame *A. M. D. Shuckburgh* desired, execute such codicil, she would hold the sum of 10,000*l.* new 3*l.* 10*s.* per cent. Bank annuities, and the dividends thereof, upon trusts, to correspond with the intention expressed in and by the paper writing of the 2d day of *August* 1833, in the said bill in that behalf mentioned; or that the said Lady *C. Denys* believed and confided in such alleged representations and promises; or that she executed the said paper writing and codicils respectively in the belief of such alleged representations, and on the faith of such alleged promises respectively. And these Defendants, and each of them, deny that the state of mind of the said Lady *C. Denys*, and the alleged influence which this Defendant Dame *A. M. D. Shuckburgh* had acquired over her, had operated as a principal or any inducement with this last named Defendant to attempt to procure the execution of the paper writing of the 12th day of *March* 1834, in the said bill mentioned in that behalf, and of the codicils of the 29th day of *March* 1834, and the 14th day of *April* 1835, in the said bill respectively mentioned in that behalf, by means of the alleged representations and promises in the said bill in that behalf mentioned; or that this Defendant, Dame *A. M. D. Shuckburgh*, sometimes used her alleged influence and control over the said Lady *C. Denys*, as a preliminary step to the introduction of the said alleged representations and promises, or sometimes as a mode of giving force and effect to the same with the said Lady *C. Denys*. And these

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Defendants, and each of them, deny that the alleged circumstances in the said bill in that behalf stated, as proving or tending to prove the state of mind of the said Lady *C. Denys*, and the alleged influence exercised over her by this Defendant Dame *A. M. D. Shuckburgh*, form a material link in the evidence by which the said complainant, as alleged, is able and intends to prove the said alleged representations and promises to have been made, or that all or any or either of the alleged representations and promises of this Defendant Dame *A. M. D. Shuckburgh* in the said bill in that behalf stated and set forth, were made and done by her in all respects or in any respect with the privity and approval of this Defendant Sir *F. Shuckburgh*, and this Defendant Dame *A. M. D. Shuckburgh*, and so far as the same, as alleged, were subsequent to the alleged discovery by her of the paper writing of the said 2d day of *August* 1833, in concert and collusion also with *Eliza Couch* in the said bill named; or that he this Defendant Sir *F. Shuckburgh* was privy and party to and approved of all the alleged designs of this Defendant Dame *A. M. D. Shuckburgh*. Without this, that," &c.

The Vice-Chancellor having allowed this plea, the Plaintiff appealed.

Mr. *Wigram* and Mr. *Loftus Wigram*, in support of the appeal, cited the following authorities; viz. upon the equity of the case; *Podmore* v. *Gunning* (*a*), *Barrow* v. *Greenough* (*b*), *Marriott* v. *Marriott* (*c*), and *Segrave* v. *Kirwan* (*d*); and, upon the question of the validity of the plea, *Thring* v. *Edgar* (*e*), *Tarleton* v. *Hornby*, in the Exchequer, before Lord *Lyndhurst*; *Jones* v. *Davis* (*g*), *Chamberlain*

(*a*) 5 *Sim.* 485.
(*b*) 3 *Ves.* jun. 152.
(*c*) 1 *Str.* 666.
(*d*) 1 *Beatty*, 157.
(*e*) 2 *Sim. & Stu.* 274.
(*g*) 10 *Ves.* 262.

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*Chamberlain* v. *Agar* (*a*), *Roche* v. *Morgell* (*b*), *Crow* v. *Tyrell* (*c*), *Arnold* v. *Heaford* (*d*), *Emerson* v. *Harland* (*e*), *M'Gregor* v. *The East India Company* (*g*), *Jarrard* v. *Saunders* (*h*), and Lord *Redesdale on Pleading*, 257. 4th edit.

Mr. *Jacob* and Mr. *Richards*, in support of the plea, referred to the following authorities; *Lord Redesdale on Pleading*, 195. 199. 223. 241. 3d edition; *Pope* v. *Bish* (*i*), *Edmundson* v. *Hartley* (*k*), *Bayley* v. *Adams* (*l*), *Mayor of Dartmouth* v. *Seale* (*m*), *Hardman* v. *Ellames* (*n*), *Devonsher* v. *Newenham* (*o*), *Angell* v. *Westcombe* (*p*), *Watkins* v. *Stone* (*q*), *Earl of Clanrickard* v. *Burk* (*r*), *The Attorney-General* v. *The Corporation of Bristol*, before Lord *Eldon*, *Beames on Pleas*, 37.; *Sanders* v. *King* (*s*), *Pennington* v. *Beechey* (*t*), and *M'Gregor* v. *The East India Company*. (*u*)

Mr. *Loftus Wigram*, in reply, cited *James* v. *Sadgrove* (*x*), and *Watkins* v. *Stone*. (*y*)

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*The* LORD CHANCELLOR. *July* 29.

This case came before me, on an appeal from an order of the Vice-Chancellor, allowing a plea. The bill, which is very long, makes a claim to a sum of 10,000*l.*

(*a*) 2 *V. & B.* 259.
(*b*) 2 *Sch. & Lef.* 721.
(*c*) 2 *Mad.* 397.
(*d*) 1 *M'Cleland & Younge*, 330.
(*e*) 3 *Sim.* 490. 8 *Bligh, N. S.* 62.
(*g*) 2 *Sim.* 452.
(*h*) 2 *Ves.* jun. 187,
(*i*) 1 *Anst.* 89.
(*k*) 1 *Anst.* 97.
(*l*) 6 *Ves.* 586.
(*m*) 1 *Cox*, 416.
(*n*) 2 *Mylne & Keen*, 732.
(*o*) 2 *Sch. & Lef.* 199.
(*p*) *Wigram on Discovery*, 181.
(*q*) 2 *Sim. & Stu.* 560.; and 2 *Sim.* 49.
(*r*) 4 *Vin. Ab.* 442.
(*s*) 6 *Mad.* 61.; and 2 *Sim. & Stu.* 277.
(*t*) 2 *Sim. & Stu.* 282.
(*u*) 2 *Sim.* 452.
(*x*) 1 *Sim. & Stu.* 4.
(*y*) 2 *Sim. & Stu.* 560.

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10,000*l.* stock; and — without stating more of the substance of the bill than is necessary in order to explain the view which I take of these pleadings — the bill alleges that Lady *Charlotte Denys*, the mother of the Plaintiff, being possessed of certain other property, and having power of disposing of other property, in the year 1833, made a codicil, giving to the Plaintiff a certain interest in a sum of 10,000*l.* stock. It appears that, subsequently, a codicil was made, in the year 1834, which diminished or altered the interest which the Plaintiff would take in that sum of stock; and, finally, a codicil was made in *April* 1835, depriving the Plaintiff, on the face of the codicil, of all interest in that stock, and giving it to the Defendant, Lady *Shuckburgh*. Now the bill alleges that, at the respective times at which the codicils of 1834 and 1835 were executed, the Defendant represented to the testatrix that she (the Defendant) had made up her own mind, and was determined to make a provision for the Plaintiff herself, and particularly that previously to the execution of the codicil of 1835, she expressly promised the testatrix, that if the testatrix would execute that codicil, she would provide for the Plaintiff, with regard to the 10,000*l.*, in the same manner as had been provided for him by the codicil of 1833; and upon that the equity is founded; namely, that the Defendant having obtained the execution of this codicil from the testatrix on a promise to deal with the money which passed by that codicil in the manner stated, for the benefit of the Plaintiff, a trust is created, and that the Plaintiff therefore has a right against this legacy of 10,000*l.*, to have that trust carried into execution for his benefit.

Now the bill, for this purpose, and in order to raise the probability of the story, states very many circumstances, for the purpose of establishing the very great influence which the Defendant had obtained over the testatrix, and also the great kindness which the testatrix felt

felt towards the Plaintiff, in order to shew the great probability of the testatrix not having revoked that previous disposition, without providing some means by which the Plaintiff might derive the benefit of the gift; and these are extended over a very long statement in the bill; all, however, having a tendency to establish some one or other of the propositions which would go to shew the probability of what the Plaintiff alleges, namely, this contract on the faith of which the codicil was executed. To some of the allegations of this bill I shall have occasion to refer more particularly. The bill, so constituted, — and after having set out the title and the ground on which this property was claimed, — prays that it may be declared that the sum of 10,000*l.*, 3½ per cent. Bank annuities and the dividends thereof, as from the death of Lady *Charlotte Denys*, were and are subject to a trust, corresponding with the directions and provisions of the paper writing of the 2d of *August* 1833; and that proper persons may be appointed trustees of that sum, and that the same may be transferred into the names of such trustees; and that Sir *Francis* and Lady *Shuckburgh* may be decreed to account for the dividends, and so on; — not praying anything with regard to the codicils, for the purpose of setting them aside, or affecting them, but seeking, on the whole statement in the bill, to create a trust, on which the Plaintiff rests his title to the sum of 10,000*l.*: and, undoubtedly, if the facts are made out as they are stated in this bill, with respect to which I have no means of judging one way or the other, there is, on the face of the bill, that which would constitute a trust; there is an allegation of a codicil having been executed for the benefit — apparently for the benefit — of the Defendant, on an express promise that the money so bequeathed should be used in trust for the Plaintiff.

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Now to this bill, containing an infinite variety of allegations, all tending to establish or support some part or other of the propositions on which the Plaintiff rests his title to the 10,000*l.* stock, the Defendant has pleaded. I should first state the allegation in the bill as to the promise, which is twice repeated, but repeated very much in the same words. The allegation is, — That Lady *Charlotte Denys* was extremely unwilling to execute the paper writing of the 12th of *March* 1834, the codicil of the 29th of *March* 1834, and the codicil of the 14th of *April* 1835 respectively; and that, in order to induce her so to do, Lady *Shuckburgh*, previously to the execution of the same instruments respectively, and in particular previously to the execution of the codicils of the 29th of *March* 1834 and the 14th of *April* 1835, from time to time represented to Lady *Charlotte Denys* that she, Lady *Shuckburgh*, had always intended, out of the benefits which she was to derive under the will and codicils of Lady *Charlotte Denys*, to make some considerable provision for the Plaintiff and his family; and before the execution of the codicil of the 14th of *April* 1835, she, Lady *Shuckburgh*, expressly and in terms promised Lady *Charlotte Denys* that, if she would, as she (Lady *Shuckburgh*) desired, execute the last mentioned codicil, she would apply the said sum of 10,000*l.* stock for the benefit of the Plaintiff and his children, according to the provisions of the paper writing of the 2d of *August* 1833; that Lady *C. Denys* believed such representations and promises of Lady *Shuckburgh*, and that she executed the paper writing of the 12th of *March* 1834, and also both the codicils of the 29th of *March* 1834 and the 14th of *April* 1835, and particularly the last mentioned codicil, in reliance on the truth of such representations, and on the faith of the said promises.

This

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This allegation is repeated afterwards, in the charging part of the bill, very much, I believe, in the same terms, —certainly so much in the same terms as not to depart from it in any material particular. Now, here is a bill, therefore, the equity of which rests on that promise. Other circumstances are stated, throughout the bill, leading to the conclusion that such a promise might have been made, or probably had been made; aiding, therefore, the object which the Plaintiff has in view, namely, to establish the fact of such a promise having been made.

The plea is to all the bill except certain parts: then it proceeds to except certain passages, which are obviously excepted for the purpose of taking from the bill those allegations which it was supposed by the pleader were introduced for the purpose of establishing the affirmative of what the bill alleges, and therefore he very properly excepted them from the bill, inasmuch as, where the bill alleges a fact, and alleges other circumstances calculated and tending to prove that fact, you cannot plead the negative of the fact, without denying those allegations in the bill which have a tendency to prove that fact; and whatever you do not exclude and deny is considered as admitted to be true, and therefore you admit the allegation tending to establish the proposition, although you deny the proposition itself. I admit the Plaintiff has a right to discovery by answer in support of the plea, as to those circumstances which, if admitted, would exclude the validity of the plea.

So far, therefore, the frame of the plea is undoubtedly correct: whether it goes far enough, whether it excludes all the statements that are introduced and to be found on the face of the bill for that purpose, is a matter which I do not, at the present moment, consider. It excludes, however, two passages in the bill, the first of

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which is in these words, "whether, in order to induce," —these are the excepted passages to which the plea does not apply — "whether, in order to induce Lady *Charlotte Denys* in the said bill named to execute the paper writing and codicils in the said bill in that behalf mentioned respectively, or some or one and which of them, this Defendant, Dame *Anna Maria Draycott Shuckburgh*, did not, previously to the execution of the same instruments respectively, and whether or not in particular before the execution of the codicils in the said bill in that behalf mentioned, or when else, from time to time, or at some and what time, represent to the said Lady *Charlotte Denys* that she, this Defendant Dame *Anna Maria Draycott Shuckburgh*, had always intended, out of the benefits which she was to derive under the will and codicils of the said Lady *C. Denys*, to make some considerable provisions for the Plaintiff and his family, or how otherwise." That is excepted. Now certainly, that is not the foundation of the equity, for the equity does not rest on Lady *Shuckburgh* having represented that she had intended, out of the benefit, which she might derive from her mother Lady *C. Denys*, to make a provision for the Plaintiff; but, undoubtedly, it is a material allegation in the bill, as tending to shew that the testatrix relied on some promise from the legatee in favour of the Plaintiff; and therefore the pleader very properly excepts out of it those allegations. Then, however, the plea goes on thus: — "And whether, before the execution of the codicil of the 14th day of *April* 1835 in the said bill in that behalf mentioned, she, the said Lady *Shuckburgh*, expressly and in terms promised the said Lady *C. Denys* that, if she would, as she, the said Lady *Shuckburgh*, desired, execute the last mentioned codicil, she would apply the sum of 10,000*l.* stock for the benefit of the said complainant and his children, according to the provisions of the paper writing of the 2d day of *August* 1833 in

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in the said bill in that behalf mentioned, or to some and what other purport or effect; and whether the said Lady *C. Denys* did not believe such representations and promises of the said Lady *Shuckburgh* in the said bill alleged, or how otherwise; and whether the said Lady *C. Denys* did not execute the paper writing and the codicils in the said bill in that behalf mentioned, or some or one and which of them; and whether or not particularly the codicil in the said bill in that behalf mentioned, in reliance on the truth of such alleged representations, and on the faith of the said alleged promise, or how otherwise." Now, that is the substance of the equity; that is the alleged promise on the faith of which it is alleged that the codicil was executed. The result, therefore, is, that the plea, having excepted the promise upon which the whole equity rests, goes on, after excepting certain other passages, to plead the negative;— "Do plead in bar and for plea, say they, deny that, before the execution of the codicil of the 14th of *April* 1835, in the said bill in that behalf mentioned, or at any time, she, this Defendant Dame *Anna Maria Draycott Shuckburgh* expressly or in terms, or in any manner promised, represented, or stated to Lady *C. Denys* in the said bill named, that if she would execute the said last-mentioned codicil, she, this Defendant Dame *A. M. D. Shuckburgh*, would apply the sum of 10,000*l.* stock in the said bill mentioned, or any part thereof, for the benefit of or hold the same, or any part thereof, upon trust for the said complainant and his children, or any or either of them, according to the provisions of the paper writing of the 2d day of *August* 1833 in the said bill mentioned, or according to any other provisions, or in any other manner."

The plea negatives, therefore, the allegation of the promise. What I particularly observe upon is, that first it takes out of the bill the allegation of the promise,

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mise, and then denies it. Now I apprehend that is not correct, and that no such plea can be supported. A negative plea is a mere traverse; it differs from an ordinary plea; inasmuch as the ordinary plea admits the truth of the bill, but states some matter *dehors*, which destroys the effect of the allegation, and which, assuming the allegation to be true, would be a defence. A title to an account or a title to a sum of money, perfectly good on the face of the bill, may be met by a plea, stating a release. It is quite consistent with the whole statement in the bill; it admits the statement to be true, but states that which, if established by evidence, will displace the title of the Plaintiff. A negative plea, however, is a mere traverse of that which constitutes the Plaintiff's title. Now, to traverse that which is not alleged on the face of the bill, — to take out of the bill an allegation, and then by plea to negative the allegation, — is a mode of proceeding which leaves the record in a state which renders it impossible for the Court afterwards to deal with it.

Several objections were taken to this plea. It was objected first, that the plea does that which I have now observed upon, — excepts the alleged promise, and then traverses the allegation. And it was also objected that the bill contained statements which are not excluded, and which tend to establish the truth of the case made by the bill. A great variety of decided cases were referred to in the course of the argument, and I can find not one of them in which a negative plea has been so framed, with the exception of *Thring* v. *Edgar* (*a*); and it is very singular that, in that case, the plea seems, as far as one can judge from the statement of the report, to have adopted the same course, and, being a negative plea, to have excepted from the bill the allegation which it

(*a*) 2 *Sim. & Stu.* 274.

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it was intended to traverse; and it is very singular that, in that case, Sir *John Leach* did not advert to, and probably was not aware of the fact, that that was the shape and frame of the plea; because he speaks of the answer overruling the plea. Now the answer cannot, strictly speaking, be said to overrule the plea, when the plea and answer are to distinct and several matters; but if that learned judge had been aware that in the bill, as pleaded to, there was no such allegation as that which was traversed, the objection would have been equally valid, although not rested precisely on the same ground. Now, it is singular enough that that case was decided, without adverting to the fact that the plea took out of the bill the allegation intended to be traversed; and, perhaps, it is as singular that, in this case, the Vice Chancellor, when he decided it, certainly was not aware that such was the frame of this plea. I not only have that from a note of his judgment with which I have been furnished, but I have very good reasons for knowing that, in point of fact, he was not aware that that was the shape of the plea; and if he had been aware of the shape of the plea, I have not the least doubt, instead of giving effect to the plea, he would have overruled it. Now he states, in the note which has been furnished to me of his judgment, that his opinion is, that the plea is perfectly good; and that it appears to his Honor that there is no one point whatever by means of which any relief can be had in equity, except by means of the point which consists of the averment of the fact of the promise, and therefore that the denial by the plea of that promise does effectually displace the Plaintiff's equity; and that he was also of opinion, that the mode in which the plea is drawn is right, because the plea does not profess to be a plea to the whole bill, and so answer something which in terms it professes to cover, but that it is a plea to all the bill, save and except so much of the bill as in effect relates to the promise. Now, in point of fact, the bill to which the plea pleads contains

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contains no allegation of promise at all; and the only way of trying how that would operate is to suppose issue to be taken on the plea; how would it be to be tried? It would be an issue taken on the traverse only; on the negative of that which nobody has affirmed. This is an entire novelty, of which there is no instance, except the case of *Thring* v. *Edgar* to which I have referred, in which I think it is quite obvious that the judge was not aware that it existed. It is quite obvious that he was not aware that, strictly speaking, the plea and the answer were not to the same matter, and that therefore there could be no over-ruling of the answer by the plea; but it is equally clear that if he had been aware that the plea had taken out of the bill that which constituted the equity, namely, the matter traversed, he would not have considered the plea as good.

Independently, however, of this objection, after looking through this long bill with every possible attention, I am quite satisfied that this plea does not take out of the bill one twentieth part of that which ought to be taken out, before the plea can be allowed; for every allegation, not taken out of the bill, is admitted; and the Plaintiff has a right to state circumstances leading to the conclusion on which his equity is founded, and has a right to have a distinct answer as to all those circumstances. That is not disputed; it is clearly laid down in *Jones* v. *Davis* (*a*), *Evans* v. *Harris* (*b*), and *Hardman* v. *Ellames* (*c*). The plea has attempted to do that which, in this case, seems to have been utterly impossible, and in very few cases is possible; namely, to a bill, so constituted as this is, to plead to part and answer to part; for unless it can be clearly shewn that the allegations which are pleaded to do not tend to that conclusion which the Plaintiff

(*a*) 16 *Vesey*, 262.
(*b*) 2 *V. & B.* 361.
(*c*) 5 *Sim.* 640.

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Plaintiff seeks to establish, the Defendant cannot support a negative plea, by leaving unanswered and admitted allegations which go to establish the issue upon which the Plaintiff's equity rests. It would be occupying a great deal more time than is at all necessary if I were to go through the various allegations which I have marked as coming, in my opinion, within that rule; but there are one or two which seem to me to put the fact so entirely beyond all doubt, that I will just advert to them. For instance, the bill says, "And, as further evidence of the matters aforesaid, your orator charges that both the said codicils of the 29th day of *March* 1834 and the 14th day of *April* 1835 were made at the suggestion of the said Lady *Shuckburgh;* and that the contents and effect thereof were suggested by her; and that she gave instructions or directions for the same to the said *Henry Francis;* and that he received his instructions or directions for the same from her." It is true that that does not go to the whole case; it does not prove the promise; but, if there is any doubt in the case, it is obvious that this is a very important matter, which may operate very much in favour of the Plaintiff's claim. Then the bill charges, "That the truth of the matters aforesaid would further appear if the Defendants hereto would state and set forth, as they are able and ought to do, with whom the idea or design of the said alleged codicil of the 14th day of *April* 1835 originated; and whether the idea or design of the same did not in truth originate with the said Lady *Shuckburgh.*" Then it goes on with a long passage, enumerating a variety of circumstances connected with the preparation of that codicil, for the purpose of shewing that the whole scheme of that codicil was her's, and that it did not originate with the testatrix herself. Then there is a charge, "that the Defendants respectively have, at various times, written letters to, or had other written communications with, each other, and with

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with various other persons; and have, at various times, received letters or other written communications from each other, and from various other persons, touching, or concerning, or relating to, the matters aforesaid," — the matters aforesaid being the contract, and all the circumstances connected with it — "or some of them, or which it would be advantageous for your orator to see, with reference to his claim in this suit." Now that is admitted, for it is not excluded. The Defendants, therefore, admit that they are in possession of letters which would tend to establish the facts stated on behalf of the Plaintiff. Then the bill goes on, in another passage, to allege, that the Defendants are in possession of "certain drafts of such codicil, certain fair copies of such drafts, certain instructions for the said codicil of the 14th day of *April* 1835, certain memoranda relating to the same." That they admit; and these documents they also, by the plea, endeavour to protect themselves from producing.

On these two grounds, either of which, I conceive, is sufficient, I apprehend this plea is bad in point of form. I certainly have the satisfaction of knowing that, if the case had been presented to the Vice-Chancellor's mind in the way in which it has been brought before mine, it would have met with a very different result. I am clearly of opinion that the plea ought not to have been allowed; and that the order now made must be to overrule it: and I am equally clear that, having regard to the frame of this bill, there is an utter impossibility of making any such plea an effectual defence, and, therefore, it is perfectly useless to give the Defendant an opportunity of pleading again, so as to avoid those difficulties in which the case seems to be inextricably involved by the mode in which the bill is framed.

Plea over-ruled.

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## In the Matter of the OXFORD Charities.

*Aug.* 1, 2.

Property appropriated by a municipal corporation, to the maintenance of lecturers to preach before the corporation, is not property held by the corporation upon a charitable trust, within the meaning of the seventy-first section of the act *5 & 6 W. 4. c. 76.*

UPON a petition presented under the act *5 & 6 W. 4. c. 76.* (regulating Municipal Corporations), for the appointment of new trustees of property lately held by the corporation of *Oxford*, or any members of it in their corporate character, upon any charitable trust, a question arose whether the four city lectureships came within the provisions of the seventy-first section of that act. (*a*)

The

(*a*) The seventy-first section is in the following words:—

"And whereas divers bodies corporate now stand seised or possessed of sundry hereditaments and personal estate, in trust, in whole, or in part, for certain charitable trusts; and it is expedient that the administration thereof be kept distinct from that of the public stock and borough fund; be it enacted, that in every borough in which the body corporate, or any one or more of the members of such body corporate, in his or their corporate capacity, now stands or stand solely, or together with any person or persons elected solely by such body corporate, or solely by any particular number, class, or description of members of such body corporate, seised or possessed, for any estate or interest whatsoever, of any hereditaments, or any sums of money, chattels, securities for money, or any other personal estate whatsoever, in whole or in part, in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate, or of such member or members of such body corporate in respect of the said uses and trusts, shall continue in the persons who, at the time of the passing of this act, are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office, by virtue of which, before the passing of this act, they were such trustees, until the 1st day of *August* 1836, or until parliament shall otherwise order, and shall immediately thereupon utterly cease and determine: provided always, that, if any vacancy shall be occasioned among the charitable trustees for any borough before the said 1st day of *August*, it shall be lawful for the Lord High Chancellor, or Lords Commissioners of the Great

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The Honourable *Robert Lee*, (afterwards Earl of *Lichfield*,) by his bond, dated the 20th of *December* 1762, became bound to certain citizens of *Oxford*, in the penal sum of 2000*l.*, subject to a condition for payment, by his executors or administrators, to those persons, of the sum of 1000*l.* within twelve months after his decease, in trust to be by them applied and disposed of, either towards discharging such debts due from the mayor, bailiffs, and commonalty of the city of *Oxford*, as the mayor, recorder, and aldermen of the city for the time being, or any four or more of them should think fit, or in such other manner, for the use and benefit of the mayor, bailiffs, and commonalty of the city of *Oxford*, and their successors, as the mayor, recorder, and aldermen of the city for the time being, or any four or more of them should direct and appoint.

Previously to and at the time of the passing of the act 5 & 6 *W.* 4. *c.* 76. already mentioned, the Municipal Corporation of *Oxford* consisted of a mayor, a recorder, four aldermen, eight assistants, two bailiffs, two chamberlains, a town clerk, twenty-four common councilmen, and an indefinite number of persons who had served as common councilmen, consisting in the whole of about eighty persons; and the style of the corporation was, "Mayor, Bailiffs, and Commonalty."

By

Great Seal for the time being, upon petition, in a summary way, to appoint another trustee to supply such vacancy; and every person so appointed a trustee as last aforesaid shall be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he shall then cease to be a trustee: provided also, that if parliament shall not otherwise direct, on or before the said 1st day of *August* 1836, the Lord High Chancellor or Lords Commissioners of the Great Seal shall make such orders as he or they shall see fit, for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates."

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By an indenture, dated the 28th of *January* 1778, and made between the then mayor, recorder, and aldermen of the one part, and *William Wickham*, of the city of *Oxford*, of the other part, after reciting the bond already mentioned, and further reciting that the said mayor, aldermen, and recorder had agreed, in pursuance of the power and authority to them given in and by the said bond, to found four lectureships for the use and benefit of the said mayor, bailiffs, and commonalty, and had invested the said 1000*l.* in the purchase of ten shares of the *Oxford* Canal Navigation, in the names of the said mayor, recorder, and aldermen, and that the same should be applied in manner therein-after mentioned; and that the said *William Wickham* had agreed to transfer five other shares in the said Canal Navigation to them, the mayor and recorder, and aldermen, and also to give the same as an addition to the fund for the same uses and purposes; it was witnessed, that it was mutually covenanted and agreed, by and between the said mayor, recorder, and aldermen, and the said *William Wickham*, that the said mayor, recorder, and aldermen, and the survivors and survivor of them, should stand and be possessed thereof, in trust for the maintenance of four lecturers, to preach before the mayor and corporation of *Oxford*, at such times and place as they should from time to time appoint, a sermon in the forenoon, and another in the afternoon, upon every *Sunday* throughout the year; and to pay unto, or empower, permit, and suffer the said four lecturers to receive the interest, profits, and dividends arising from the said shares, equally, share and share alike. And it was thereby provided and agreed, that the said lecturers should be appointed, chosen, and qualified in manner thereinafter mentioned; that is to say, that the said lecturers should, from time to time, be nominated and chosen by the mayor, recorder, aldermen, and assistants,

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of the city of *Oxford*, for the time being, or the major part of them, by ballot; and should be masters of arts, or bachelors of law, or superior graduates of the University of *Oxford*, who should be generally resident in some college or hall there, and in holy orders; and that, as often as any vacancy should happen in any of the said lectureships, they, the said mayor, recorder, aldermen, and assistants, or the major part of them, should elect some person, qualified as aforesaid, to be lecturer, in order to supply every such vacancy; and that *Monday*, next before the feast of *St. Matthew* the Apostle, should always be the day of election of every such lecturer.

It was also provided, that every person so elected to be a lecturer should continue such until his death, resignation, or removal; and that, so often as three fourths of the number of electors for the time being should, in their discretion, think proper to remove any such lecturer, they should have power so to do, in a particular manner. The deed contained a power for the mayor, recorder, aldermen, and assistants for the time being, or any nine of them, to sell the canal shares, and to invest the produce upon other securities, but upon the same trusts as before declared; and also to make such further orders, rules, and regulations respecting the lectures, or the increasing or reducing the number thereof, as they should from time to time find necessary and think expedient, for the better answering the original design and intention of the parties to the deed. And it was provided, that, upon the death of any of the trustees in whose names the shares or money should be vested, the survivors should transfer the same to the mayor, recorder, and aldermen of the city, for the time being, upon the same trusts as were therein-before declared.

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Ever since the date of this indenture, four lecturers have been from time to time chosen in pursuance of its provisions.

Sir *C. Wetherell*, for certain petitioners in a cross-petition, contended, that these lectureships came within the operation of the seventy-first section of the act of parliament, and, therefore, that trustees of the property should be appointed; but that the corporation, and not those trustees, should nominate the lecturers.

Mr. *Blunt, contrà*, for the Corporation of *Oxford*.

Mr. *Goodeve*, for the petitioners in the original petition.

*The* Lord Chancellor.

It appears that this was a sum of money given to the Corporation of *Oxford*, in terms which gave them a right to dispose of it as they pleased, and that they thought proper to appropriate it to the endowment of four lectureships, and to apply the income to the payment of the four lecturers. The question now is, whether that be or be not a charitable trust, within the meaning of the seventy-first section of the Municipal Corporation Regulation Act. It may be so far for the benefit of the corporation, that every member of the corporation may have a right to insist, that it shall not be appropriated to any purposes beyond the limits of the corporation. I do not apprehend that the seventy-first section of the act of parliament meant to take away any funds exclusively appropriated for a corporate purpose. I consider the appropriation of this property in the same light as if the corporation had appropriated it to the maintenance of any other officer for the corporation, and for the corporation exclusively. If the property be now carried to trustees, the trustees who

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will be the persons to pay will also be the persons to appoint, and the appointment may then be for the benefit of the inhabitants of *Oxford*, but no longer for the benefit of the corporation exclusively.

If this be not a charitable trust, for purposes *dehors* the corporation, it is not within the seventy-first section, and never was in the hands of the corporation, subject to be dealt with, by the members of the corporation, as a charitable trust. If this be a charitable trust at all, it is a charitable trust within the limits of the corporation. The corporation may say, the sermons shall be preached to themselves with closed doors; for there is no provision that they shall be preached in any particular church. The whole trust is exclusively for the corporation; the congregation of no one church can claim it.

There is no middle course; the property must either be left in the corporation, or it must be handed over to trustees, who will then have the power of appointing the lecturers. I find the property subject to no trust, except for the benefit of the corporation; and I therefore think, that it is not within the seventy-first section of the act of parliament.

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*Nov.* 17.

## SMITH *v.* WEBSTER.

The Masters have no power to dispense with or relax the General Orders of the Court.

IN this cause, exceptions to the Defendant's answer were delivered on the 16th of *March* 1837: the order to proceed on them was dated the 29th of *March*, and served on the 4th of *April*, and the Master's report, allowing the exceptions, was made on the 21st of *April*. No certificate of the necessity of further time for the purpose

purpose of making the report had been obtained or applied for.

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The eight days, allowed by the fifth order of 1828, for the Defendant to submit to the exceptions, expired on the 24th of *March* 1837, which was *Good Friday;* and the office of the Secretary to the Master of the Rolls was closed, for the *Easter* holidays, from *Thursday*, the 23d of *March*, to *Monday*, the 3d of *April;* but on *Wednesday*, the 29th of *March*, a petition to the Master of the Rolls, for an order referring the exceptions, was put into the letter-box at the office, and on the 3d of *April* the order was applied for, but could not be obtained until the next day, the 4th; when it was delivered to the Plaintiff's solicitor, dated the 29th of *March*. On the same day, the order was served on the Defendant's clerk in Court, and a copy was left at the Master's office, and application made for a warrant to proceed upon the exceptions; but the Master's clerk said he could not then issue such warrant: a similar answer was given, on the next day, to another application, to the same effect. On the 6th of *April*, however, a warrant to proceed was obtained for the 12th of *April*, which was the earliest day which could be appointed for that purpose. On the 12th of *April* the warrant was attended; but upon the Defendant's solicitor urging, as a preliminary objection, that the exceptions had not been referred within the time limited by the orders of the Court, the Master required an affidavit on the part of the Plaintiff, explaining the causes of the delay. An affidavit was accordingly made, which detailed the circumstances above mentioned, and was left at the Master's office on the 13th of *April*.

On the 18th of *April*, being the earliest day for which a warrant could be obtained, the Master was again attended, when he intimated an opinion that due diligence had

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had been used to obtain the order of reference; and decided, that, under the circumstances, he was entitled to proceed, notwithstanding the objection which had been taken. The Defendant's agent then stated, that he was not at that time prepared to proceed; and, accordingly, the Master directed, that the exceptions should be proceeded with upon another warrant. Upon the 21st of *April* another warrant was attended; and it was objected, by the Defendant's solicitor, that the time for making the report had expired; but the Master over-ruled that objection; and, upon hearing counsel for the Plaintiff and for the Defendant, the Master allowed the first exception, and made his report to that effect on the same day.

The Defendant subsequently moved, before the Master of the Rolls, that the report might be taken off the file, for irregularity; but his Lordship having refused the application, it was now renewed before the Lord Chancellor.

Mr. *Koe* appeared in support of the motion.

Mr. *Blunt*, *contrà*, referred to the case of *Burrell* v. *Nicholson* (*a*), and contended that the Master was entitled to consider that case as giving him an authority to relax the strict terms of the order, if special circumstances, such as the case of the offices being shut, prevented a party's proceeding.

*The* LORD CHANCELLOR.

The Master has no power over the general orders of the Court. The object of those orders is to regulate the proceedings in the Masters' offices; but they would be useless for that purpose, if it were supposed that the Masters

(*a*) 6 *Sim.* 212.

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Masters had the power of dispensing with them. If the delay in obtaining the Master's report has arisen from the Defendant's being unprepared to proceed, I will not allow him afterwards to get rid of the report, upon the ground of the delay which he has himself occasioned; and I will set the parties right; but it must not be in such a way as shall give the Masters any power to dispense with the orders. I think the proper course will be to make no order on this motion; but I wish it to be understood that I do not refuse this application upon the ground that the Master had the power of doing what he has done, but I refuse it upon the ground that the Court will not allow a party to take advantage of a delay which has been allowed for the sake of his own convenience. (*a*)

His Lordship gave the Defendant three weeks' time to answer the exceptions.

(*a*) See the case of *Milbanke* v. *Stevens*, 8 *Sim.* 160.; the doctrine of which, as to the Masters' power of dispensing with the orders, seems at variance with that laid down in the present case.

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## The ATTORNEY-GENERAL *v.* HILL.

1838. *March* 24.

Where a defect of parties, not suggested by the answer or insisted upon by the Defendants at the hearing, rendered it necessary that the cause should stand over for the purpose of amending the record, by adding parties, the Defendants were held entitled to the costs of the day.

THIS was an information seeking to set aside a lease of lands belonging to a charity, and to have an account taken of the by-gone rents. A part of the lands comprised in the lease had been underlet by one of the Defendants, the lessee, to another person, but the sub-lessee

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lessee was not made a Defendant. The Defendants did not, by their answer, or at the bar, take any objection upon that ground; but the relators themselves called the attention of the Court to the defect of parties, and asked that the cause might stand over, to give them an opportunity of making the sub-lessee a Defendant.

Mr. *Wigram* and Mr. *Bethell* submitted, that if the cause stood over to accommodate the relators, the Defendants ought to have the costs of the day.

Mr. *J. Russell* and Mr. *O. Anderdon*, *contrà*, contended, that as the objection for want of parties was not taken by the answer, the Defendants, according to the common rule, were not entitled to the costs of the day. The relators had a right, and were willing, to proceed with the hearing of the cause, and to take such a decree as, upon the present state of the record, they were entitled to against the original lessee.

*The* Lord Chancellor, however, said, that the lessee was, as to the land which he had under-let, a trustee for the sub-lessee, and that he could not permit the cause to go on in the absence of the latter; and he gave the Defendants the costs of the day, on the ground that, although the Defendants had no interest in taking the objection, the record was so framed that it was impossible to proceed effectually with the cause.

# REPORTS

OF

# CASES

ARGUED AND DETERMINED 1837.

IN THE

# HIGH COURT OF CHANCERY.

## PENTLAND *v.* QUARRINGTON.

1837.
*August* 1.

A suit was instituted by one person in the name of another, under a power of attorney, and a decree was made. The Defendant, who was aware that the suit was in fact prosecuted by the attorney, subsequently made an arrangement with the nominal Plaintiff, that all proceedings should be stayed for twelve months; and this arrangement was embodied in an order made upon the application of the Defendant, and by consent of the nominal Plaintiff, but without the concurrence of the attorney. A petition was afterwards presented by the attorney, praying that the order might be discharged for irregularity, and that the attorney might be at liberty to prosecute the suit without the interference of the nominal Plaintiff: Held, that no part of the prayer of this petition could be granted.

*Semble*, a supplemental bill should have been the course adopted, instead of a petition.

BY an agreement under the hand of *George Pentland*, dated the 24th of *March* 1829, after reciting that he had, by certain instruments, conveyed and assigned his estate and effects therein mentioned, upon the trusts and for the purposes, and subject to the charges, and to be applied as therein mentioned, to *John James Fraser* and *Charles Campbell Stewart*, and reciting that *Pentland* had lately contracted for the purchase of certain estates, situated in the county of *Carmarthen*, called respectively *Dyffrin* and *Tyre Yuchen*, or *Tyre Christopher*, for the sum of 6000*l.*; and that *Pentland* not being provided with that sum, nor having the means of raising it, had requested *Fraser*

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*Fraser* to raise the same for him, to enable him to complete the purchase, which would be of great advantage to him in a pecuniary view, which *Fraser* had agreed to do, upon having the repayment thereof, with interest, secured in manner after-mentioned, and had, of that date, paid down to the sellers, or one of them, 500*l.* of the purchase-money; *Pentland*, in consideration of the premises, agreed with *Fraser*, his heirs, executors, and administrators, that when and so soon as the estates so purchased should have been conveyed to him, he would convey or assure the same to *Fraser*, or as he should direct, to be held by him on the trusts and for the purposes, and under and subject to the charges, powers, provisoes, and agreements, and to be applied as in and by the before recited instruments had been declared, concerning the estates and property thereby conveyed or intended so to be, or such of them as should be then subsisting or capable of taking effect.

By an indenture of release and assignment, grounded on a lease for a year, and bearing date in a subsequent part of the year 1829, *Pentland* conveyed and assigned to *Fraser*, his heirs, executors, and administrators, according to the nature and quality thereof, all the messuages, lands, tenements, hereditaments, and estate and effects, real and personal, whereof or whereto he was seised, possessed, or entitled, or at any time thereafter should or might become entitled, in possession, reversion, remainder, or otherwise howsoever, situate and being in *England* and *Wales*; to hold unto and to the use of *Fraser*, his heirs, executors, administrators, and assigns, upon the trusts thereinafter declared. And for better enabling *Fraser*, his heirs, executors, administrators, and assigns, to recover, receive, and get in the said messuages, lands, tenements, hereditaments, estate, and effects, *Pentland* did thereby make, constitute, and irrevocably

irrevocably appoint *Fraser*, his heirs, executors, administrators, and assigns, the true and lawful attorney and attornies of him (*Pentland*), in his (*Pentland*'s) name, to ask, demand, sue for, recover, and receive of and from all persons to whom it did, should, or might belong, to pay or deliver the same, the said messuages, lands, tenements, hereditaments, estate, and effects, and all sums of money to arise or be produced by sale, mortgage, or other disposition of, or otherwise from or on account of the same, and upon receipt thereof, to give sufficient discharges and acquittances for the same; and upon non-payment thereof, or of any part thereof, to take, commence, exercise, and prosecute, in the name of him, *Pentland*, his heirs, executors, or administrators, or otherwise, all such powers, remedies, actions, suits, expedients, and means, in and about the premises, as he (*Pentland*) might or could have done, in case the indenture of release had not been made; and also from time to time to nominate one or more attorney or attornies, agent or agents, under him (*Fraser*), his heirs, executors, administrators, and assigns, for all or any part of the purposes aforesaid, he, *Pentland*, thereby allowing, ratifying, and confirming, and agreeing and promising to allow, ratify, and confirm, all and whatever *Fraser*, his heirs, executors, or administrators, should lawfully do or cause to be done in or concerning the premises, by virtue of the indenture of release. The deed declared that all the property was released and assigned upon trust that *Fraser*, his heirs, executors, and administrators, and other the trustees and trustee for the time being of the trust estate, at his and their proper discretion and authority, without any other consent or concurrence of *Pentland*, his heirs, executors, or administrators, than was thereby given and expressed, should immediately, or at any subsequent time, sell all the property, absolutely, or for any number of years, or

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other estate or interest, or mortgage the same in fee, or for any term or number of years, and afterwards sell, either subject to the mortgages, or discharged therefrom; and until such sale upon trust, that *Fraser*, his heirs, executors, or administrators, should enter upon the property, and take the rents and profits for the purposes directed or referred to concerning the same. And it was declared, that *Fraser*, his heirs, executors, and administrators, and other the trustees or trustee for the time being of the trust estate, should, out of the sums of money to arise from the sale or mortgage of the property, or from the rents and profits thereof, after payment of expenses, pay off and discharge the debts due from *Pentland*, at such time or times, and in such course, order, priority, and manner, as to him or them should seem most convenient, and should pay the residue to *Pentland*. And *Pentland* covenanted with *Fraser*, that in case he (*Fraser*) or any other trustees or trustee for the time being, should be desirous to resign the trusts, it should be lawful for *Fraser*, or such trustees or trustee, to appoint some other fit person or persons to be a trustee or trustees in his or their stead; and that then the trust property should be so conveyed and assigned, as legally to vest it in the continuing or only acting trustees or trustee, and such new trustees or trustee, or in such new trustees only, as the case might require; and that such new trustees or trustee should thenceforth act in the management and execution of the trusts, in the same or like manner to all intents and purposes, and be vested with the same or the like powers or authorities, as well to give receipts and other discharges, as in all other respects whatsoever, as if he or they had been originally appointed a trustee or trustees.

On

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On the 16th of *May* 1829, *Fraser*, as trustee under the before-mentioned deed, instituted the present suit, in the name of *Pentland*, for the purpose of enforcing a specific performance of the contract for purchase of the before-mentioned estates in *Carmarthenshire*. By the decree made in the cause, on the 25th of *June* 1831, it was ordered that the agreement of the 17th of *March* 1829 (being the agreement for purchase) should be specifically performed: and it was referred to the Master to inquire whether a good title could be made to the estates comprised in that agreement, and whether all the objections taken, by the Plaintiff, to the title, except the claims of Mr. *Tanner* in the pleadings mentioned, had been waived by the Plaintiff; and if so, when they were waived; and further directions and costs were reserved.

By indentures of lease and release, dated in *July* 1831, *Fraser*, by virtue of the power given to him by the indenture of release and assignment of 1829, appointed *Paton* to be a trustee in his (*Fraser*'s) stead, and conveyed and assigned to him, his heirs, executors, and administrators, all the messuages, lands, tenements, and hereditaments, and estate and effects, real and personal, in *England* and *Wales*, which, under the indenture of release and assignment of 1829, were vested in *Fraser*; to hold the same upon the trusts of that indenture.

Subsequently to the execution of the deeds of *July* 1831, *Paton* carried on this suit.

In pursuance of the decree, the Master, by his report dated the 5th of *November* 1832, confirmed absolutely on the 17th of *June* 1833, stated that he was of opinion, that during the continuance of a certain

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demise or mortgage to *John Tanner*, a good title could not be made to the estates comprised in the agreement; and that he was of opinion that all objections taken by the Plaintiff to the title, except the claims of *Tanner*, had been waived by the Plaintiff from the 4th of *May* 1829.

By the order on further directions, dated the 17th of *April* 1834, it was declared that the agreement for sale ought to be specifically performed, and performance was decreed accordingly; and it was ordered that the Defendant *Quarrington* should pay off the outstanding mortgage due to *Tanner*, and should convey the estates to the Plaintiff, or to whom he should appoint.

By an order of the 3d of *November* 1836, it was referred to the Master to take an account of what was due from the Defendant *Quarrington* to the Plaintiff, pursuant to the agreement mentioned in the order, in respect of the rents and profits of the estate purchased, and that the amount should be retained in paying the purchase money: and a reference was also directed as to the amount of the purchase money and interest.

By an order made on the 13th of *January* 1837, it was ordered that the Defendant *Quarrington* should, within four days, bring in an account of what was due from him to the Plaintiff, pursuant to the agreement of the 17th of *March* 1829, upon oath, or in default thereof, that the serjeant at arms should apprehend him. This order, though duly served, was not complied with.

On the 26th of *January* 1837, an order was made in this cause, by the Master of the Rolls, upon the motion of the Defendant *Quarrington*, that all proceedings in

in the cause should be suspended for twelve calendar months from the 7th of *January* 1837; *Pentland* appearing by counsel, and consenting. The motion was made in pursuance of a previous arrangement between *Pentland* and *Quarrington*.

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The order was made without the consent or privity of *Paton*, who now presented a petition, praying that it might be discharged for irregularity, and that he might be at liberty to conduct the suit in the Plaintiff's (*Pentland*'s) name, and that the Plaintiff might be restrained from obstructing or interfering with the petitioner in the conduct of it.

The petition was supported by affidavits, shewing that the Defendant was, at the date of the last mentioned motion, and had long been, well aware, that the suit, although instituted and prosecuted in the name of the Plaintiff, had in fact been instituted by *Fraser*, and was conducted by him while he continued to be a trustee of the before-mentioned trust deed, and by *Paton*, from the time at which he succeeded *Fraser* in the trust. It was, indeed, admitted, in the affidavits sworn on the part of the Defendant *Quarrington*, in opposition to the petition, that his solicitor had been frequently informed that the suit was conducted by *Paton* as the trustee of *Pentland*.

Sir *W. Horne* and Mr. *Charles Webster*, in support of the petition, contended that the power of attorney, contained in the deed of 1829, gave *Fraser* a complete right to institute and conduct this suit in *Pentland*'s name, and also, upon his own retirement from the trust, to appoint another person, who should have the same power to carry on the suit as *Fraser* himself had; and that *Paton*, having been duly appointed under that power, had now a full right to prosecute the suit: and that as the

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Defendant well knew that the suit was conducted by *Paton*, and was substantially his suit, although instituted, by virtue of the power, in the name of *Pentland*, no order made between the nominal Plaintiff and the Defendant could be regular, without *Paton*'s concurrence.

*The* LORD CHANCELLOR.

I want some precedent to justify me in carrying into effect the trusts of that deed upon petition. It is a perfectly new equity. The only suit in Court, is a suit between *Pentland* and the party with whom the contract of purchase was made. *Pentland* is a party to the arrangement, for effectuating which the present order has been made. Your case is against him, that whereas he has authorised you to carry on this suit in his name, he has entered into the arrangement in question, without your concurrence. If I were to make such an order as is asked by this petition, I should be giving you the right of carrying on the suit against *Pentland;* I should be displacing the Plaintiff on the record. Your equity is against him; but how can I administer that equity without another suit? I am not questioning your right, out the means of enforcing it. Is there any instance of such an interference on the part of the Court as you now ask?

Sir *W. Horne.*

I admit that I have never seen a case like the present; but it startles one to think, that when a suit has been conducted under so common a power of attorney as this, the suit can be paralysed, even after decree, by a Defendant who knows in what manner it has been all along conducted. However, a supplemental bill shall be filed.

*The*

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*The* LORD CHANCELLOR.

It appears to me that you must take that course; assuming what you state to be true.

Sir *W. Horne.*

The petition will then stand over, and be intituled in the two causes.

*The* LORD CHANCELLOR.

The parties are brought here upon a petition which I think is informal; and the only thing the Court can do is to dismiss it with costs. I only dispose of it on the point of form.

Petition dismissed with costs.

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Mr. *Wigram* and Mr. *Hindes* appeared for the Defendant *Quarrington.*

Mr. *Parker* appeared for *Pentland.*

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Nov. 2.

## The ATTORNEY-GENERAL *v.* COOPER.

The irregular amendment of a bill is not a ground for taking it off the file, if the record can be restored to the state in which it was before the amendment was made; but if, in effecting such irregular amendment, a new engrossment has been made, such new engrossment may be ordered to be taken off the file.

An application, by a number of relators named in an information, to strike out the names of several of themselves, will not be granted, even though the Defendants will not be prejudiced; unless it appears, either that, without the alteration, justice will not be done, or that the suit cannot be so conveniently prosecuted if the alteration be not made.

THIS was an information filed by the Attorney-General, at the relation of *Richard Gibbs* and eight other persons, against the corporation of *Evesham*, and certain private individuals. After the Defendants had appeared, it was discovered by the town agent of the relators that all the relators except *Gibbs* were members of the corporation; and therefore an order of course was obtained at the Rolls, on the petition of the relators, for amending the information; and the information was accordingly amended, by striking out the names of all the relators except *Gibbs*. The Six-clerk, however, conceiving that such an amendment was irregular, refused to enter it in his book; and as the Defendants refused to consent to the amendment, a special application, on the part of the relators, was made to the Vice-Chancellor, for an order to amend, by striking out the names of all the relators except *Gibbs*, without costs, upon amending the Defendants' office-copies, and undertaking to give security for payment of the Defendants' costs to the present time, if any such costs should be awarded. The ground of this application, stated in the notice of motion, was, that the relators in question were members of the corporation, and Defendants in the suit.

The Vice-Chancellor refused this motion with costs.

At the same time, some of the Defendants brought on a motion, that the information might be taken off the file for irregularity, with costs, and that the relators might pay to those Defendants their costs of the suit; or

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or that the relators' Clerk-in-court might be directed forthwith to restore the record to its original form, and that the relators might pay the costs of that application. The Vice-Chancellor made an order that the information should be taken off the file, for irregularity, with costs, and that the Defendants who moved should pay the costs of the appearance of the other Defendants, and have them over from the relators.

Two motions were now made, before the Lord Chancellor; one, to discharge the order of the Vice-Chancellor for taking the information off the file; and the other for leave to amend.

Sir *W. Horne* and Mr. *Blunt* appeared in support of both motions, and stated that the Attorney-General's consent to the proposed alteration had been obtained.

Mr. *Wigram* appeared for the Defendants who obtained the order for taking the information off the file.

Mr. *Wakefield*, for the corporation of *Evesham*.

Mr. *James Russell*, for another Defendant.

*The* Lord Chancellor.

In this case, several persons being named as relators, some of them are desirous of withdrawing their names from the information, and an order to amend has therefore been obtained at the Rolls, under which an amendment has been made, by striking out the names of eight out of nine relators, which is admitted to have been an irregular amendment. The Defendants then gave notice of a motion, that the information might be taken off the file, or that the record might be restored to its its original form.

The

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The relators, on the other hand, seek, by a special order, to be permitted to do that which, by an irregular amendment made under an order of the Court, they had already done.

I will first dispose of the point which I have first mentioned. Assuming, for the present purpose, that the Court should be of opinion that no proper case was made for the amendment, the question is, whether an irregular or improper amendment is a ground for taking a bill off the file. No case has been cited in which the Court has done so; and it would be contrary to all principle that it should be so. The irregularity is cured by restoring the record to the state in which it was before the irregularity was committed. Why an irregularity in the progress of the cause should be a ground for destroying a suit altogether, it is difficult to imagine; and no authority was cited in support of such a proposition. Whenever the irregular amendment consists in a new engrossment, that new engrossment may be taken off the file: because then the original record will stand in the same state in which it was before the irregular amendment was made; but the case is different where the amendment is made, by altering the original record, and the alteration can be expunged, and the record thus restored to its original state. A case may be stated in which the manner in which the original record has been altered may make it impossible to restore the record to its original state; but, where the amendment has been made merely by striking out the names of some of the co-plaintiffs or co-relators, nothing can be more simple or easy for the Court to do than that which it would be consistent with principle to do, viz., to restore the names so struck out. If there was no ground for the amendment in this instance, it appears to me that the proper order would be to undo that which had been

been improperly done, without going further. Of course, the party who came to have that irregularity corrected would be entitled to the costs of the application made for that purpose.

Then I am to consider whether there is ground for the application made by the relators, that they may have leave to strike out the names of eight of themselves. It cannot be justly said, that all that the relators have to establish in support of such an application is, that the Defendants will not be prejudiced by such an alteration; they must shew that justice will not be done, or that the suit cannot be so conveniently prosecuted unless the alteration is made. I cannot give them such an advantage as they ask, and permit them to alter the record, merely because they may have a different wish at one time from that which they may have at another time, which may be the result of mere caprice. Nothing has been said to shew that there is the least necessity for this alteration, beyond a mere matter of feeling, that as the persons in question are members of the corporation, they do not wish to be relators in a suit against the corporation. That is no ground for the alteration. They may act upon that feeling, if they think fit, by taking the course which has been mentioned at the bar; namely, by procuring the dismissal of this information; and then another might be filed, the next day, at the relation of the other relator only; but I cannot give the assistance of this Court for that purpose by means of a special order, unless I consider that justice requires that the alteration should be made. I do not raise any question as to the power or jurisdiction of the Court, to give liberty to make such an amendment as is desired; but no facts have been brought before me to justify me in giving that liberty. I think, that if the application to amend had been originally made before me, I should have

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have refused it; and that, upon the other motion, I should have ordered the record to be restored to the state in which it was before the amendment was made.

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The appeal motion for leave to amend was refused with costs; and the order of the Vice-Chancellor for taking the information off the file was varied, by directing that the record should be restored to its previous state, but without any costs of the appeal on either side; the Defendants retaining the costs of their motion before the Vice-Chancellor.

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*April* 12.
*Dec.* 2.

In the appointment (under the Municipal Corporations Regulation Act,) of trustees of property lately held by a corporation upon charitable trusts, persons who are members of the new corporation are not ineligible as trustees, even although the corporation may have formerly set up a claim to the property in opposition to the charity.

A person's name had been submitted to the Master as a new trustee, and he had been approved by the Master, but without any affidavit of his respectability. Such an affidavit was afterwards produced to the Lord Chancellor, and no objection to his respectability was made:

Held, that there was no ground for referring the question of his appointment back to the Master.

## In the Matter of the LUDLOW Charities.

THE LORD CHANCELLOR delivered judgment in this case, in the following terms: —

This was a petition by several persons, describing themselves as late members of the corporation of *Ludlow*, objecting to nine persons, out of seventeen, appointed by the Master to be trustees of the charity estates, in consequence of the provisions of the Municipal Corporations Reform Act: the only objection against six being, that they are members of the corporation, and against two, that they are officers of the corporation; the petition praying, that it may be declared that

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that the corporation of *Ludlow* having an interest directly at variance with the interests of the charities, the members of such corporation ought not to be appointed trustees of the charity estates: and the objection to the ninth, Mr. *Nightingale*, being, that his name was introduced into the Master's report, without any notice being given to the petitioners or their solicitors, and without any affidavit of his respectability; but, at the bar, his respectability was not disputed. The trusts of the charity property, as stated in the petition, are, 1st. To support a grammar school; 2nd. To make certain allowances to a certain number of poor; 3rd. To provide a preacher and assistant to the rector. (*a*)

There does not appear to be anything in the nature of these trusts, which can create an interest in the corporation, at variance with the interests of the charities. On the contrary, the trusts are all for the benefit of the inhabitants of the town; and, as the members of the corporation, as now constituted, may well be supposed to represent the inhabitants, the interests of the corporation and of the charities can hardly be supposed to be in any degree at variance: and it is to be recollected, that the corporation had been trustees of these charities, at least from the time of the charter of *Edward* VI. It is, however, said, that the corporation have contended that part of the property belongs to the corporation, and is applicable to corporate purposes; and to this claim may, I presume, be referred the contest which seems to have existed, during the spring of 1836, for the possession of the property, and the documents belonging to it.

Whatever

(*a*) It did not distinctly appear from the papers in the case, whether these offices of preacher and assistant to the rector, were held, or intended to be held, by one and the same person.

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Whatever may have been the grounds of this claim, the six members of the corporation, appointed trustees by the Master, being willing to accept the trusts of this property, as charity property, cannot hereafter set up any title inconsistent with such trusts. Indeed, the corporation property being now wholly applicable to the public purposes of the town, the individual members of the corporation have no greater interest in contending that the property in question is corporation property, than any other inhabitant in the town; and to exclude individual members of the corporation upon this ground, would be to establish a principle which would lead to the exclusion of all inhabitants, and would probably apply to the persons proposed by the petitioners; and it is to be considered, that if I were to hold the objection valid, and appoint persons to be trustees who are not now members of the corporation, I should be declaring that if, at any future time, they should be elected members of the corporation, they ought to cease to be trustees, which would be most inconvenient, and would exclude all those from the trust who most enjoy the good opinion and confidence of the inhabitants. I cannot, therefore, think that this objection ought to have prevailed with the Master.

As to Mr. *Nightingale*, it appears that there was some omission, his name not having been included in the affidavits which deposed to the respectability of the other persons proposed; and no affidavit having been required as to him, before his appointment. This omission has now been supplied. It is, however, said, that due and regular notice was not given of his name being introduced into the Master's report. If any substantial objection had now been brought forward against Mr. *Nightingale*, the circumstance stated might certainly explain why such objection had not been raised before the

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the Master, and excuse the omission; but, as all objection to the respectability of Mr. *Nightingale* is disclaimed, and his respectability is now deposed to, so that no question remains as to his being an unobjectionable trustee, it cannot be supposed that I shall refer the question of his appointment back to the Master, because there may have been some want of due notice of his name having been adopted. It is proper, however, to see how the facts stand.

It appears that, on the 28th of *January* 1837, the Master was attended upon the state of facts and proposal of the town council, when the Master was informed that Mr. *Baugh*, who had been approved of by the Master, declined to act, whereupon the name of Mr. *Nightingale* was substituted for his, in the list approved by the Master. Mr. *Baines*, the solicitor for the petition, was served with the warrant for this attendance; but it does not appear that he was present. On the 11th of *February*, however, Mr. *Parkes* (*a*) and Mr. *Baines* went over together the draft of the report, and not only was Mr. *Nightingale's* name then in the report, but Mr. *Baines* admits that he observed that it was there; and some observations passed respecting it; and on that 11th of *February*, the Master invited either party to state to him any incorrectness in his report, before the return day of the warrant for signing the report. No objection was made; and the report was signed on the 16th of *February*.

I find then, that of the nine persons appointed by the Master, and objected to by this petition, no objection to the respectability of any one is stated; and, considering that I cannot admit an objection, under the circumstances,

(*a*) The solicitor for the corporation of *Ludlow*.

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stances, resting solely upon the fact of some of them being members of the corporation, and finding that there are seven or eight of those appointed who are not members of the corporation, and who will therefore be able to prevent any evil which might possibly arise from the alleged adverse claims to the property — but which evil I see no reason to apprehend — I do not find any ground upon which, following the principle upon which this Court always acts in such cases, I can withhold my confirmation of the Master's report; and as neither the respondents personally, nor the charity funds, ought to bear the expense of this petition, I cannot do otherwise than dismiss it with costs.

Sir *C. Wetherell*, Mr. *Wigram*, Mr. *Romilly*, and Mr. *James Parker*, appeared as counsel for the different parties.

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1838. *Feb.* 24. 28.

## In the Matter of ISAAC WOOD, a Lunatic.

## And in the Matter of the Act for the Abolition of Fines and Recoveries.

Under the act 3 & 4 *W.* 4. *c.* 74. for the Abolition of Fines and Recoveries, the Lord Chancellor is not the protector of the settlement in the place of a lunatic, when the lunatic is tenant in tail in possession.

*Semble*, that where a lunatic has a particular estate, in respect of which the Lord Chancellor is protector of the settlement, and has also the remainder or reversion in fee, subject only to an intervening estate tail, his Lordship will not concur in any deed for barring the estate tail.

*ROBERT RANDES WOOD*, by his will, dated the 11th of *April* 1801, devised all his real estates, situate within the bail of *Lincoln*, and in the county of *Lincoln*, both freehold and copyhold, to his brother *Isaac Wood*, and the heirs of his body lawfully to be begotten: And for default of such issue, he devised the

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the same as follows; viz., one moiety to his cousin *Margaret*, wife of *Thomas Foster*, and the heirs of her body lawfully to be begotten; and for default of such issue, unto his cousin *Elizabeth Clark*, wife of *John Darcy Clark*, and the heirs of her body lawfully begotten, or thereafter to be begotten; and in default of such issue, to his own right heirs for ever: And the other moiety he devised to *Elizabeth Clark*, and the heirs of her body lawfully begotten, or thereafter to be begotten; and for default of such issue, to *Margaret Foster*, and the heirs of her body lawfully to be begotten; and, for default of such issue, to his own right heirs for ever: And the testator devised to *William Pearson* and *William Hallifax*, their heirs, executors, administrators, and assigns, all his leasehold hereditaments situate in *Newport* in the city of *Lincoln*, and in the fields adjoining thereto, then held by lease for three lives from the prebend of *St. John*'s in *Lincoln*; and also all his leasehold hereditaments situate in the bail of *Lincoln*, and in the city of *Lincoln*, in trust for such person and persons, and for such estates and interests, and in such manner and form as therein-before expressed, limited, and declared concerning the before devised freehold real estate, or as near thereto as might be, and the nature of the several leasehold estates would admit of, to the end that the same might be held and enjoyed, and go along with the freehold estates, so long as might be, and the laws of *England* would permit.

The testator died in the year 1811, leaving *Isaac Wood* his heir at law and customary heir, and leaving *Margaret Foster* and *Elizabeth Clark* surviving him.

In the meantime, a commission of lunacy had issued against *Isaac Wood*; and, by an inquisition, dated the 26th of *January* 1801, he had been declared to be a person of unsound mind.

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*Margaret Foster* died on the 2d of *February* 1832, without having ever had any issue.

A petition was now presented by *J. D. Clark* and *Elizabeth* his wife, stating that the petitioner, *Elizabeth Clark*, was desirous, with the concurrence of her husband, to bar her estate tail in remainder, and to limit the estates to herself, in fee-simple, in remainder, expectant on the decease and failure of issue of *Isaac Wood*; and praying that the Lord Chancellor, as the protector of the settlement under the act for the Abolition of Fines and Recoveries, would consent to the barring of the estate tail in remainder of the petitioner *Elizabeth Clark*, with the concurrence of her husband, by such deed or deeds as might be considered necessary and proper to be executed, acknowledged, and enrolled, for the purpose of barring such entail, and the remainders over, and limiting the same estates to the petitioner, *Elizabeth Clark*, in remainder in fee.

An affidavit filed in support of the petition stated, that the lunatic was now of the age of sixty-four years and upwards, and had never been married.

Mr. *Wigram* and Mr. *Younge*, in support of the petition, stated, that it was not the desire of the petitioners to affect the lunatic's interests in any possible way; but merely to provide against the contingency of the petitioner, *Elizabeth Clark*'s dying in the lifetime of the lunatic. (*a*) The petitioners were willing to adopt any mode of preserving all the rights of the lunatic which the Court might suggest. The only object was, to obtain the concurrence of the Lord Chancellor, as protector of the

(*a*) It was stated at the bar, that Mrs. *Clark* was older than the lunatic, and had no issue; and that the Master had found that she was his heiress at law, if *Clement Wood*, who went to *America* many years ago, and had not since been heard of, were dead.

the settlement, in an act in which there could be no doubt that the lunatic, if sane, would concur; and therefore this was just that sort of case in which the legislature contemplated that his Lordship's jurisdiction might be beneficially exercised.

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In the Matter of Wood.

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*The* LORD CHANCELLOR. *Feb.* 28.

This is an application to me as protector of a settlement. As the property is now settled, it is vested in the lunatic as tenant in tail, with an intermediate limitation to the petitioner, in tail, with the ultimate fee in the lunatic. I am asked, under the authority of the act of parliament, to consent to a deed having the effect of a recovery, the object of which is (in the event of the lunatic not recovering, and barring his estate tail and the remainders over) to give the fee to another person who states herself to be a near relation of the lunatic.

A fatal objection to this application is, that the case is not within the act of parliament at all. I am not protector of the settlement within the act of parliament. Upon a petition in *The Matter of Blewitt* (*a*), Lord *Brougham* first, and afterwards Lord *Lyndhurst*, held that such a case was not within the act.

If, however, I had the power which I am asked to exercise, it appears to me that I should not be justified in so dealing with the lunatic's property. He has the whole interest in the estate except the intermediate interest vested in the female petitioner; and if that should drop during his life, he will have the absolute interest.

If I had the discretion, I certainly should not exercise it; but I think I have not.

(*a*) 3 *Mylne & Keen*, 250.

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## WHATFORD *v.* MOORE. (*a*)

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*August* 30.

*A.* being tenant for life, with remainder to his sons in tail, with remainder to his daughters in tail, and having only one daughter, who was under age, and about to be married, by a deed, executed on the occasion of the marriage, conveyed his life estate to trustees, upon trust, as to part, for the wife, during the joint lives of herself and her husband, for her separate use, with remainder upon trust for her husband; and as to the other part, upon trust for the husband, for the joint lives of himself and his wife, with remainder upon trust for the wife; and in case the husband and wife should both happen to die in his lifetime, and there should be any child or children of their two bodies at the death of the survivor of them, upon trust for all and every such child and children, in such shares and manner as the husband and wife should appoint, and, in default of appointment, equally; and in case there should be no such child or children of the husband by the wife, or there being such, all of them should happen to die in the lifetime of *A.*, upon trust for such persons as the wife should appoint; and in default of appointment, for the survivor of husband and wife, and the heirs and assigns of such survivor, during the remainder of the life of *A.*

*ELIZABETH HARTNOLL*, by her will, dated the 9th of *August* 1733, devised the capital messuage and manor of *Cadeleigh* to trustees, in trust, as

(*a*) This case is reported on the hearing before the Vice-Chancellor, in 7 *Sim.* p. 574.; but, as the Lord Chancellor in his judgment adverts to a part of the principal deed, which is not stated in that report, it has become necessary to state it here; and, under these circumstances, it has been thought most convenient that a statement of all the facts, complete in itself, should appear in the present report.

It was by the same deed provided, that when the wife attained her full age, a recovery should be suffered, which should enure to the use of trustees during the life of *A.*, upon the several trusts before mentioned; and after his death, and for want of issue male of his body, as to part, to the use of trustees, in trust for the wife for life, for her separate use, with remainder to the use of the husband for life; and as to the other part, to the use of the husband for life; and in case his wife survived him, then, as to the whole of the property, to the use of the wife for life, with remainder to the use of trustees, during the several lives of husband and wife, to preserve contingent remainders, with remainder to trustees for 500 years thence next ensuing, with remainder to such son of the marriage as husband and wife should appoint, in tail, with remainder to the use of the first and other sons of the marriage, successively, in tail, with remainder to the use of the daughters of the marriage, as tenants in common in tail, with remainders over. It was declared that the trustees of the 500 years term should stand possessed thereof in case the husband should happen to die, leaving issue by the wife, an eldest or only son, who should live to attain twenty-one, or die before and leave such issue, and one or more younger son and sons, and daughter and daughters, or daughter or daughters only of the marriage, upon trust, that the trustees should, after the several deaths of the husband and wife and the commencement of the term, but not before

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as to a moiety thereof, (except three tenements particularly mentioned, for certain estates,) to the use of *John Hartnoll* for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail male, with remainder to his daughter and daughters in tail, with remainder over; and as to the other moiety, (except as before mentioned,) to *Elizabeth Pierce* for ninety-nine years, if she should so long live, with remainder to *John Hartnoll* for life, with remainder to trustees to preserve contingent remainders, with the like remainders over as of the other moiety.

By indentures of lease and release, dated the 13th and 14th of *September* 1763, reciting (amongst other things) that a marriage had been agreed upon between *John Russell Moore* and *Elizabeth Hartnoll*, spinster, only child of *John Hartnoll*, it was witnessed that *John Hartnoll* granted and released to *Richard Blundell* and *William Moore*, their heirs and assigns, the manor of *Cadeleigh*, and all messuages, lands, and hereditaments belonging thereto, and the capital messuage, farm, and demesne lands of *Cadeleigh*, and the advowson of the rectory of *Cadeleigh*, and all the other hereditaments given to *John Hartnoll*, in possession, reversion, remainder, or expectancy, by the will of *Elizabeth Hartnoll* the testatrix; to hold to the use of *John Hartnoll* until the intended marriage (subject to the claim of *Caleb Pierce*, and

sooner, unless the husband should by writing direct, but without prejudice to the estates and interests of the wife, raise, for the portion or portions of the daughter and daughters, and younger child and children of the marriage, there being then an elder or only son, or the heirs of the body of such son then living, the several sums next thereinafter mentioned, *viz.* if only one such younger child, 2000*l.*, if two, 3000*l.*, and if three or more, 4000*l.*, for the portions of such younger

children, share and share alike, and to survive to the survivors and survivor of them, but so as such two surviving younger children should have no more raised than 3000*l.*, nor any one such surviving child any more than 2000*l.*; to be paid to daughters at the age of eighteen years or days of marriage, which should first happen, after the deaths of the husband and wife, otherwise within three months next after the death of the survivor of them; and to be paid to sons at twenty-one, or sooner, if the trustees should, after the several deaths of the husband and wife, in their discretion judge necessary.

There was issue of the marriage, one son and three daughters, all of whom survived both parents, except one daughter, who died in the lifetime of both, after she had attained eighteen and been married: Held, that such daughter did not become entitled to any portion.

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and the said *Elizabeth Pierce* his wife, in a moiety of the same premises for the residue of the term of ninety-nine years, if she should so long live, under the will of *Elizabeth Hartnoll* the testatrix), with remainder to the use of *Blundell* and *W. Moore*, their heirs and assigns, during the life of *John Hartnoll*, subject as aforesaid, upon trust, and to the intent that they might be seized thereof, and be thereby enabled to make such conveyances as should be necessary for carrying into execution a certain decree of the Court of Chancery, made in a specialty creditors' suit for administering the estate of *Elizabeth Hartnoll*; and subject as aforesaid, as to the messuage, farm, and demesne lands of *Cadeleigh*, upon trust that *Blundell* and *W. Moore* and their heirs, should, during the joint lives of *John Hartnoll* and *Elizabeth* his daughter, receive the rents, subject to the right of *Elizabeth Pierce*, and, after payment of a certain annual sum of 47*l.* to one *Darley* for a certain time, pay such rents into the proper hands of *Elizabeth Hartnoll*, for so long time as she and *John Russell Moore* should jointly happen to live, for her separate use; but in case *J. R. Moore* should happen to survive *Elizabeth Hartnoll*, and *John Hartnoll* her father should be then living, upon trust for *John Russell Moore* during the joint natural lives of him and *John Hartnoll*: And as to the manor and residue of the messuages and hereditaments before released, to the use of *Blundell* and *Moore* and their heirs, during the joint lives of *Hartnoll* and *Darley*, upon trust, to pay 41*l.* 4*s.* per annum to *Darley*, and, subject thereto, upon trust for *J. R. Moore* and his assigns, during the joint lives of him and *John Hartnoll*, subject to the right and claim of *Elizabeth Pierce*, and otherwise as aforesaid; and in case *Elizabeth Hartnoll* should happen to survive *J. R. Moore*, and *John Hartnoll* her father should be then living, upon trust for *Elizabeth Hartnoll* and her assigns, during the joint natural lives of

of herself and her father: And in case *J. R. Moore* and *Elizabeth Hartnoll* should both happen to die in the lifetime of *John Hartnoll*, and there should be any child or children of their two bodies at the death of the survivor of them, upon trust and for the benefit of all and every such child and children, in such parts, shares, and proportions, and in such manner as *J. R. Moore* and *Elizabeth Hartnoll* should, by deed or writing, appoint; and in default of such appointment, upon trust for all and every such child and children, share and share alike, if more than one, and if but one, then solely for such only child: And in case there should be no such child or children of *J. R. Moore* by *Elizabeth Hartnoll*, or there being such, all of them should happen to die in the lifetime of *John Hartnoll*, upon trust for such persons as *Elizabeth Hartnoll* should, notwithstanding her coverture, by will, appoint; and for want of such appointment, upon trust for the survivor of *J. R. Moore* and *Elizabeth Hartnoll*, and the heirs and assigns of such survivor, during the then remainder of the estate and interest thereby granted for the natural life of *John Hartnoll*.

It was further witnessed, that it was declared and agreed between *John Hartnoll* and *Elizabeth Hartnoll* his daughter, and *John Russell Moore*, that when and as soon as *Elizabeth Hartnoll* should attain her age of twenty-one years, which she would attain about the 20th of *November* 1764, or within six calendar months next after her attaining such her age, *John Hartnoll*, *John Russell Moore*, and *Elizabeth Hartnoll*, and *Richard Blundell* and *William Moore*, and all other proper parties should do all necessary acts for suffering a recovery, in order to bar the estate tail limited by the will of *Elizabeth Hartnoll* the testatrix, to the daughter and daughters of *John Hartnoll*, expectant on the limitation to *John Hartnoll*'s first and other sons successively in tail male, and all future reversions over, limited by the same will, and

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and which recovery should enure to the use of *Darley*, during the joint lives of himself and *John Hartnoll*, for securing to *Darley* an annuity of 84*l.*, with remainder to the use of *Blundell* and *William Moore* and their heirs, during the life of *John Hartnoll*, to such uses, ends, and purposes, and upon the several trusts, and subject to the several provisoes and declarations thereinbefore mentioned concerning the same, and from and after the death of *John Hartnoll*, he dying without leaving any issue male living at his death, or afterwards born alive, or there being such issue male, and all of them afterwards happening to die before any one of such issue male should attain his age of twenty-one years, whereby such issue male would fail, and be extinct, then, for want of such issue male, or on failure of such issue male as aforesaid, and in either of the said cases, as the same might happen to be, to the several uses after contained, *viz.*, as to the capital messuage, farm, and demesne lands of *Cadeleigh*, upon trust that *Blundell* and *W. Moore*, or the survivor of them, his heirs and assigns, should immediately after their becoming seised of the premises upon the death or failure of the issue male of *John Hartnoll*, and for so long time thereafter as *John Russell Moore* and *Elizabeth* his intended wife should jointly happen to live, receive all the rents, subject to the right of *Elizabeth Pierce*, and pay the same into the proper hands of *Elizabeth Hartnoll*, for so long time as she and *J. R. Moore* should thereafter jointly happen to live, for her own separate use; but in case *J. R. Moore* should happen to survive *Elizabeth Hartnoll*, then to the use of *J. R. Moore* and his assigns for his life: And as to the manor and the residue of the hereditaments intended to be comprehended in the recovery, to the use of *Blundell* and *W. Moore* and their heirs, to the intent that they might do all such acts as should be requisite for the due performance of the before mentioned decree, and from and after the performance of the

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the decree, and death of *John Hartnoll* without issue male, or on failure of issue male, to the use of *John Russell Moore* and his assigns for his life, with such power of leasing as after mentioned, but subject to the right of *Elizabeth Pierce*, with remainder, in case *Elizabeth Hartnoll* should survive *J. R. Moore*, then, as well with respect to the manor and hereditaments limited to *J. R. Moore* for his life as with respect to the capital messuage and demesne lands of *Cadeleigh*, to the use of *Elizabeth Hartnoll* for life, with remainder to the use of *Blundell* and *W. Moore* during the several lives of *J. R. Moore* and *Elizabeth Hartnoll* as trustees to preserve contingent remainders; with remainder to the use of *Blundell* and *W. Moore* for the term of 500 years thence next ensuing, upon the trusts therein mentioned; with remainder to the use of such son of the body of *J. R. Moore* on the body of *Elizabeth Hartnoll* lawfully to be begotten as *J. R. Moore* and *Elizabeth Hartnoll* should by deed, in manner therein mentioned, appoint, in tail general; with remainder to the use of the first and other sons of the body of *J. R. Moore*, on the body of *Elizabeth Hartnoll*, successively, in tail general; with remainder to the use of all and every the daughters, if more than one, of the body of *J. R. Moore* on the body of *Elizabeth Hartnoll*, as tenants in common, in tail general; with cross remainders between them, in tail general; with remainder to the use of such persons as *Elizabeth Hartnoll* should, by deed or will, in manner therein mentioned, appoint; with remainder, in case *Elizabeth Hartnoll* should die in the lifetime of *J. R. Moore*, as to such of the hereditaments before mentioned as were situate in the parish of *Cadbury*, to the use of *J. R. Moore*, his heirs, and assigns for ever; and as to the capital messuage and demesne lands of *Cadeleigh*, and all the residue of the manor, hereditaments, and real estate of *Elizabeth Hartnoll* thereby settled, to the use of the right heirs of

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of *Elizabeth Hartnoll* for ever; but in case *Elizabeth Hartnoll* should survive *J. R. Moore*, then as to all the manor capital messuage and demesne lands of *Cadeleigh*, and all other the hereditaments in the parishes of *Cadeleigh* and *Cadbury*, or elsewhere, therein-before settled, to the use of *Elizabeth Hartnoll*, her heirs and assigns for ever.

And as concerning the term of 500 years therein-before limited to *Blundell* and *W. Moore*, it was declared that they should stand possessed thereof, in case the said *J. R. Moore* should happen to die, leaving issue by *Elizabeth Hartnoll* his intended wife, an eldest or only son who should live to attain his age of twenty-one years or die before and leave such issue, and one or more younger son and sons, and daughter and daughters, or daughter or daughters only of the intended marriage, upon trust that the said trustees should, by and out of the rents, issues, and profits of the premises comprised within the term, or by mortgage or sale thereof, or of a competent part thereof, for all or any part of the term of 500 years, or by all or any of the said ways as they should think fit, after the several deaths of them, the said *J. R. Moore* and *Elizabeth Hartnoll* and the commencement of the said term, but not before or sooner, unless the said *J. R. Moore* should, by any writing under his hand, request or direct the same, — but without prejudice to the several estates and interests limited to and in trust for her, the said *Elizabeth Hartnoll* as aforesaid — raise and levy, for the portion or portions of the daughter and daughters, and younger child and children of the said *J. R. Moore* and *Elizabeth Hartnoll*, there being an elder or only son or the heirs of the body of such son then living, the several sum and sums of money thereinafter next mentioned, that is to say, if only one such younger child, either a son or a daughter, then the sum of 2000*l.* for the portion of such

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such only child; and in case there should be two such younger children and no more, then the sum of 3000*l.*, for the portions of such two younger children, share and share alike; and if three or more such younger children, the sum of 4000*l.*, for the portions of all and every such younger children, share and share alike, and to survive to the survivors and survivor of them; but so as such two surviving younger children should have no more raised for their portions than the said sum of 3000*l.*, nor any one such surviving child any more than the said sum of 2000*l.*, the share or part of such of them as should be a daughter or daughters to be payable and be paid at the age of eighteen years, or days or day of marriage, which should first happen, after the several deaths of *J. R. Moore* and *Elizabeth Hartnoll*, otherwise within three calendar months next after the death of the survivor of them; and to be paid to the sons, at the age of twenty-one years, or sooner if *Blundell* and *W. Moore*, or the survivor of them, his executors, administrators, and assigns, should, after the several deaths of *J. R. Moore* and *Elizabeth Hartnoll*, his intended wife, in their discretion judge the same necessary for his or her advancement.

Provided always, and it was thereby declared, that in case *J. R. Moore* and *Elizabeth Hartnoll* should, by any deed or instrument in writing, to be by them jointly executed, in execution of the power therein-before given them for that purpose, appoint the premises to any younger son in prejudice to the eldest son and the heirs of his body (whereby such younger son, and the heirs of his body would be preferred to, and take before the said eldest son, and the heirs of his body), such elder son should be considered as a younger child of the said intended marriage, and have a share of the portions intended to be raised for such younger children.

It

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It was also provided that, until the portions should become payable, the trustees should, after the commencement of the term, raise and levy maintenance, not exceeding in the whole the interest of the said respective portions after the rate of 3*l.* 10*s.* per cent. per annum; and also, that in case a son or sons of the intended marriage, to whom the reversion and inheritance of the premises comprised within the term of 500 years at the several deaths of *J. R. Moore* and *Elizabeth Hartnoll* should descend or come, should pay the said several portion or portions intended as aforesaid for the younger child or children of the intended marriage, the trustees should stand possessed of the premises for the then residue of the term, in trust to attend the inheritance.

The deed contained a covenant by *J. Hartnoll*, that a recovery should be suffered as soon as *Elizabeth Hartnoll* should have attained twenty-one.

The marriage took effect; and there was issue, one son only, *John Hartnoll Moore*, and three daughters, *Elizabeth Moore*, *Sarah Moore*, and *Catherine Mary Moore*. The daughters all attained the age of eighteen. No recovery was ever suffered in pursuance of the covenant.

By articles, dated the 12th of *April* 1787, and made in contemplation of the marriage of *John Hartnoll Moore* with *Elizabeth Ley Dix*, after reciting (amongst other things), that there was such issue of the marriage of *John Russell Moore* and *Elizabeth Hartnoll* as before mentioned, it was covenanted by *John Hartnoll*, *J. Russell Moore*, (for himself and *Elizabeth* his wife,) and *John Hartnoll Moore*, that proper conveyances and assurances should be executed for settling all the manor and hereditaments comprised in the deed of 1763, except certain specified parts, subject to the estate of *John Hartnoll*, in some part thereof,

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thereof, to the use of certain trustees for 1000 years, by way of mortgage, for securing the repayment of 500*l.* by *John Russell Moore*, and subject thereto, to the same uses, upon the same trusts, and under the same powers and provisoes as were expressed concerning the same, by the settlement of 1763, prior to the limitations to the sons of *John Russell Moore* and *Elizabeth* his wife, except as was therein-after mentioned to be excepted; with remainder to *Blundell* and *W. Moore*, the trustees of the said term of 500 years, for the same term of 500 years, upon trust, by the same ways and means as were provided in the deed of 1763, for raising the portions for daughters and younger children, to raise and levy the sum of 2000*l.* over and above the sum of 4000*l.* provided for the said three daughters of *John R. Moore*, and to pay the same to them, the said *Elizabeth Moore*, *Sarah Moore*, and *Catherine Mary Moore*, on their respectively attaining the age of twenty-one years, or being married, which should first happen, with the consent of *John Russell Moore* and *Elizabeth* his wife, or the survivor of them; with divers remainders over.

By indentures of lease and release, dated the 30th and 31st of *October* 1788, being the settlement made in pursuance of the last-mentioned articles, and by a common recovery, the manor and hereditaments comprised in the deed of 1763, except certain specified parts, were conveyed, subject to the interest of *John Hartnoll*, for his life, and subject to the term of 500 years, limited by the deed of 1763, to *Blundell* and *William Moore*, for raising portions for the younger children of *J. Russell Moore* and *Elizabeth* his wife, to the use of three trustees for 1000 years, subject to redemption, as after mentioned; with remainder to the same uses, upon the same trusts, and subject to the same powers and provisoes as were declared by the deed of 1763, prior to the limitations therein contained to or in trust for the sons or children of

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of *John Russell Moore* and *Elizabeth* his wife (except as to the power of leasing thereby given to *J. R. Moore*): And from and after the decease of the survivor of them, *J. Russell Moore* and *Elizabeth* his wife, and subject as aforesaid, and, on failure of issue male of *John Hartnoll*, to the use of *Richard Blundell* (*William Moore* being dead) for 500 years thence next ensuing, upon trust, by the same ways and means as by the deed of 1763 were provided for raising portions for daughters and younger children of *J. Russell Moore* and *Elizabeth* his wife, to raise and levy the sum of 2000*l.* over and above the portions by the same settlement provided for such daughters and younger children; and to pay the same to such daughters and younger children in increase of their said fortunes, in the same manner, at the same ages and times, and with the same benefit of survivorship as by the deed of 1763 were provided, touching the portions thereby directed to be raised for such daughters and younger children. This settlement recited that there was such issue of the marriage between *J. Russell Moore* and *Elizabeth Hartnoll*, as has been already mentioned; and it recited also a deed-poll, by which *J. Russell Moore* and *Elizabeth* his wife, had, in pursuance of the power in that behalf given to them by the settlement of 1763, appointed all the property to *John Hartnoll Moore*, in tail general, from and immediately after the death of the survivor of them, *J. Hartnoll* and *J. Russell Moore* and *Elizabeth* his wife, and failure of issue male of *J. Hartnoll*, and the performance of the trusts declared of the premises by the deed of 1763, and in the meantime subject thereto, and also subject to the term of 500 years, thereby limited to *Blundell* and *W. Moore*, and the trusts thereof.

*Elizabeth Moore*, one of the daughters of *J. R. Moore* and *Elizabeth Hartnoll*, married *William Peppin*, and died in the year 1805, in the lifetime of her parents.

*Elizabeth*

*Elizabeth*, the wife of *John Russell Moore*, survived him, and died in the year 1820. All the children of the marriage, except *Elizabeth*, were then living.

The present bill was filed by the daughter and personal representative of Mrs. *Peppin*; and the principal question in the cause was, whether, under the settlement of 1763, Mrs. *Peppin* attained a vested interest in a share of the 4000*l.* raiseable under the trusts of the term of 500 years for younger children's portions. Another question was, whether Mrs. *Peppin* did not, at all events, attain a vested interest in a share of the additional sum provided by the marriage settlement of her brother.

The Vice-Chancellor having decided both questions in the negative (*a*), the Plaintiff appealed.

Mr. *Tinney* and Mr. *Spurrier*, in support of the appeal.

The portions became indefeasibly vested in the daughters, when they respectively attained eighteen, and the payment only was postponed, for purposes of convenience, until after the deaths of their parents. The term was an absolute term; and although the years would not begin to run until after the deaths of the parents, yet it is well settled that that circumstance will not postpone the vesting until the time at which the term was to commence; *Emperor* v. *Rolfe* (*b*), *Cholmondely* v. *Meyrick* (*c*), *Woodcock* v. *The Duke of Dorset* (*d*), *Willis* v. *Willis* (*e*), *Hope* v. *Lord Clifden* (*g*), *Powis* v. *Burdett* (*h*), *King* v. *Hake*

(*a*) 7 *Sim.* 574.
(*b*) 1 *Ves.* sen. 208.
(*c*) 1 *Eden*, 77.
(*d*) 3 *Bro. C. C.* 569.
(*e*) 3 *Ves.* 51.
(*g*) 6 *Ves.* 499.
(*h*) 9 *Ves.* 428.

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*Hake* (*a*), *Schenck* v. *Legh* (*b*), *Howgrave* v. *Cartier* (*c*), *Perfect* v. *Lord Curzon* (*d*), *Torres* v. *Franco* (*e*), *Fry* v. *Lord Sherborne* (*g*). In this case, as in some of those cases, there is no provision for the term to sink for the benefit of the inheritance. In construing marriage settlements, the Court presumes that it was intended to provide for all children of the marriage; and that, at their ages of twenty-one, or times of marriage, they will want their portions, whether their parents happen to be still living or not; and, for effectuating such a purpose, the Court will anxiously lay hold of any expressions, however slight, which may be to be found in the settlement, and will not construe the portions as contingent during the whole lives of the parents, unless there is not a single passage in the settlement which would be inconsistent with such a determination. Not only, in this case, is the limitation of the term absolute, but the declaration of the trusts of it is absolute also. Can it be said that the younger children were not objects of the settlement during the life of their parents, when there is a power for their father to direct their shares to be raised during his own life, or his wife's life, instead of at the death of the survivor of himself and his wife? There is no distinct indication in any part of the settlement that the younger children must, in order to take, survive their parents. The great preponderance of evidence upon the face of the settlement, therefore, is in favour of including all the children, and the plaintiff is not even driven to the necessity of relying upon those numerous cases before adverted to, in which the Court has held that, if there is even the slightest ambiguity or inconsistency in the terms of the settlement,

(*a*) 9 *Ves.* 438.
(*b*) 9 *Ves.* 300.; and see 5 *Ves.* 452.
(*c*) 5 *V. & B.* 79.
(*d*) 5 *Mad.* 442.
(*e*) 1 *Russ. & Mylne*, 649.
(*g*) 3 *Sim.* 243.

settlement, all children shall take; but, if it were necessary, many parts of this settlement, inconsistent with the necessity of survivorship, might be shewn.

The cases cited on the other side will probably be *Wingrave* v. *Palgrave* (*a*), *Hotchkin* v. *Humfrey* (*b*), and *Fitzgerald* v. *Field*. (*c*) In *Wingrave* v. *Palgrave* there was only one certain event; and, if there should be no daughter living at the father's death, the term was taken away. That case, however, has, in every one of the subsequent cases, been commented upon, to prevent its having any effect in the decision of any case which is not, in the strictest terms, the same. In *Hotchkin* v. *Humfrey* the deed most unequivocally pointed, throughout, at children who should survive their parents; a circumstance which was noticed in *Fry* v. *Lord Sherborne*. *Fitzgerald* v. *Field* was precisely similar to *Hotchkin* v. *Humfrey*.

It is quite clear that the parties to the marriage settlement of *John Hartnoll Moore* considered that all the portions had, at that time, become vested.

Mr. *Wigram* and Mr. *Campbell*, *contrà*, contended, upon the authority of some of the cases mentioned by the Plaintiff's counsel, and upon the terms of the settlement itself, that a younger child dying in the lifetime of either of its parents was not to take a vested interest.

*The Solicitor-General* and Mr. *Harwood*, and Mr. *Jacob* and Mr. *Duckworth*, appeared for other parties.

Mr. *Tinney*, in reply.

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*The*

(*a*) 1 *P. W.* 401. (*b*) 2 *Mad.* 65. (*c*) 1 *Russ.* 430.

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1837. *Aug.* 30.

*The* LORD CHANCELLOR.

In this case the first question is, whether, under a marriage settlement of the grandfather and grandmother of the Plaintiff, a portion became vested in a child of the marriage, the mother of the Plaintiff; such child having died in the lifetime of the father. It appears that the father of the intended wife, the Plaintiff's grandmother, was entitled for life to certain estates, with remainder to his sons in tail, with remainder to his daughters in tail; and, when the marriage took place, there was no son, and only one daughter, namely, the Plaintiff's grandmother, who was under age. The scheme of the settlement was, first to settle the life estate of the father of the intended wife, which was effected by his conveying it to trustees, who were to pay the income to the husband and wife for life, and in case they should both happen to die in the lifetime of the settlor, and there should be any child or children of their bodies at the death of the survivor of them, upon trust for the benefit of such children, in such proportions as they should by deed or writing appoint, and in default, for all *such* children equally. And if there should be no *such* child of the marriage, or being *such*, all of them should die in the lifetime of the settlor, upon trust for such persons as the wife should appoint by will; and for want of such appointment, upon trust for the survivor of the husband and wife and his or her heirs during the remainder of the settlor's life.

Now, although this estate for life of the settlor is not the subject matter of the present question, yet it is most important to consider this part of the settlement, and to compare it with that part which settles the property in question. The last mentioned provision shews that the attention of the parties was drawn to the settlement of an estate *pur auter vie* upon persons who must have been

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been dead before that provision could come into operation, inasmuch as those persons had before been made tenants for life during their lives and the life of the tenant for life. If, therefore, there had been any intention of giving to children of the marriage, who might die during the lives of their parents, the parties might easily have done what this clause proves that they knew how to do; but no question could arise upon this part of the settlement as to whether such children would take, the gift being confined to children who might be living at the death of the survivor of the parents, and the gift over being only in the event of the death of *such* children, i. e., children living at the death of the survivor of the parents, or there being *such*, they should die in the lifetime of the settlor, who is here supposed to survive the father and mother; and there is no inconsistent clause and no contradictory provision to justify any construction different from the obvious meaning of the words.

The settlement then proceeds to provide for the disposition of the inheritance; and for that purpose it provides that a recovery shall be suffered, when the wife attains twenty-one, to secure, in the first place, the previous disposition during the life of the settlor; and, after his death, the estate is settled upon the husband and wife for their lives, — the wife taking part first, with remainder to the husband for life, and the husband taking part, first, with remainder to the wife for life, — with remainder to *Blundell* and *William Moore* as trustees, for 500 years, with remainder to such son in tail as the father and mother should by deed appoint, with remainder to daughters in tail, with remainder to such person as the wife should by deed or will appoint, with remainder, if the husband should survive, as to part of the property, to him in fee, and other part to the wife in fee; and if the wife should survive, all to her in fee.

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The trusts of the term were declared to be, in case the father should die *leaving* issue by the wife, an eldest son who should live to attain twenty-one, or die before, leaving such issue, and one or more younger children, upon trust, after the deaths of the father and mother and the commencement of the term, *but not sooner, unless the father should request or direct the same,* but without prejudice to the interests of the wife, to raise portions for the younger children, there being an elder or only son, or the heirs of the body of such son *then living*, the sums following: if only one such younger child, 2000*l.* for the portion of such child; if two, and no more, 3000*l.* for the portions of such younger children; if three or more, 4000*l.* for the portions of all and every such younger children, share and share alike, and to survive to the survivors and survivor of them, but so as such two surviving younger children should have no more raised for their portions than the said sum of 3000*l.*, nor any one such surviving child any more than 2000*l.*; the share or part of such of them as should be daughters to be payable and paid at eighteen years or day or days of marriage which should first happen after the several deaths of the father and mother, otherwise within three months after such death, and to sons at twenty-one, or sooner, if the trustees should, after the death of the survivor of the father and mother, judge the same necessary for their advancement. There was then a provision that if the parents should appoint the estate to a younger son, the eldest son should be considered as a younger son, for the purpose of taking a portion. There is then a provision for maintenance, after the commencement of the term. There is no proviso as to the cesser of the term in the event of there being no children entitled to portions; but a proviso, that if any son having the inheritance shall pay the portions, the term shall attend the inheritance.

Here,

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Here, then, the portions are only raiseable in the event of the father's death, leaving a younger child or children; but there must be a son or issue of a son *then living*, i. e. at the time of the death of the survivor of the parents. There is no power of appointment amongst younger children, which has been relied upon in some of the cases; but two contingencies are pointed out; first, that at the death of the father there should be an eldest son, or his issue, and younger children; secondly, that there should be an eldest son or his issue living at the death of the survivor of the parents. There is nothing to make it necessary that, at the latter period, there should be also younger children living. If, therefore, the question had been, whether a child surviving the father, but dying before the mother, could claim a portion, the question would have been very different; and this may explain the clause of survivorship; for, although that has been referred to the age at which the portions were to be payable, and in general that construction would be adopted, yet in this case it precedes the provision as to the age at which the children were to receive their portions. The child through whom the Plaintiff claims died in the lifetime of both the parents. It is true, that in the first description of the children to take portions, the word "*such*" is not to be found, or any other word of reference to the description of children before mentioned, in describing the contingency upon which the portions were to be raiseable; that is to say, younger children living at the time of the father's death; but the word "*such*" is immediately afterwards used, and that in the description of the children who are to take the portions — "If only one such younger child,"— clearly shewing what younger children were intended. In some cases, the circumstance of there being some children living at the death of the parent, has been held to satisfy the contingency, and to let in children who had died before. This is always unsatisfactory, though

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sometimes adopted to avoid a greater absurdity, as it makes the title of one younger child depend upon some other younger child living till the death of the father, for which there could not possibly be any reason.

I have so far considered the words "then living," as referable to the existence of an eldest son or his issue at the death of the survivor of the parents; but, if these words are referable, as grammatically they may be, to the words "daughter and daughters, and younger child and children," then it would be necessary for any younger child not only to survive the father, but the mother also. It is difficult to understand the provision, that the father should have the power of directing any portions to be raised during the life of the mother, without prejudice to her interests. It could only be done by raising the portion upon the reversionary term, but that would be inconsistent with the obvious intention that a contingency should continue during the life of the mother; for if the line of the son should fail before the mother's death, it clearly was not intended that any of the daughters — who, in that event, would succeed to the estate — should have portions: but this difficulty, which can only apply to the interval between the death of the father and the death of the mother, cannot affect the present question. The provision for substituting an eldest son disinherited in the place of a younger son to whom the estate should be appointed, cannot affect this question; because, as that could only be done by the joint appointment of the father and mother, it must be ascertained before the time of the first contingency, namely, the death of the father. Is there anything in any of these provisions inconsistent with the contingency upon which the portions were to be raiseable, namely, the father dying and leaving an eldest son, or his issue, and younger children? In disposing of the life estate of *John Hartnoll*, the settlor, all children are excluded who should not be living

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living at the death of the survivor of the father and mother; and in declaring the trusts of the 500 years term, the portions are to be raised only in the event of the father dying and leaving an eldest or only son who should attain twenty-one, or die leaving issue, and one or more younger son or sons or daughters; and, however inconvenient an arrangement may be which excludes a child attaining its age in the lifetime of its parents, and dying before them, the trusts of the settlement must be followed, unless some other parts of the instrument furnish a construction inconsistent with the natural import of the words.

In a case of doubtful construction upon the whole instrument, the Court leans to that which will include children so dying, as most convenient, and most likely to have been the intention of the parties. It may be thought that Courts have gone the full length that is justifiable in order to attain this object; but no case has gone so far as to do violence to the words, if no other part of the instrument be found inconsistent with them. The rule, as laid down by Sir *W. Grant* in *Howgrave* v. *Cartier* (*a*), does not carry it further, and he decided that case upon some inaccuracies in the provisions, and particularly upon there being a power of appointment which was inconsistent with the contingency continuing. In this case there is no such power of appointment, and, beyond all doubt, a contingency must continue during the life of the mother. *Woodcock* v. *The Duke of Dorset* (*b*), has always been considered as carrying the doctrine to its utmost limits. It appears that that decision was much influenced by the consideration, that if all the children had died before the surviving parent, the fund would have gone back to the father of the intended wife. In this case it is quite clear that if all the younger children had died before

(*a*) 3 *V. & B.* 79. (*b*) 3 *Bro. C. C.* 569.

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before the father, no portions would have been raiseable, which affords a strong argument against any portion being raiseable for any one younger child dying before that time. The cases upon this subject turn upon such nice distinctions, and are so little reconcileable, that the only reasonable course is to adopt the rule which has been generally recognised, of leaning in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so; but if not, to give effect to the plain meaning of the words used. *Hotchkin* v. *Humfrey* (*a*), and *Fitzgerald* v. *Field* (*b*), in which children dying before their parents were excluded, seem to me to have been cases much more favourable to their claim than the present. In *Hope* v. *Lord Clifden* (*c*), Lord *Eldon* expressed great doubt: the contingency upon which the portions were to be raised was, indeed, the event of there being children living at the death of the father; but the objects of the portions are described as "all and every the child and children" of the marriage. In *Powis* v. *Burdett* (*d*), Lord *Eldon* proceeded much upon the provision for raising the portions in the father's lifetime, considering it as inconsistent with a construction which would make the vesting contingent upon the child surviving the father. In this case, the provision for raising the portions before the term becomes vested, applies, as I conceive, not to the lifetime of the father, at whose death the contingency was to be decided, but the possible interval between the death of the father and the death of the mother. These cases, however, and some others, which it is not necessary particularly to advert to, have proceeded upon grounds so peculiar, and have departed so widely from the rule of construing instruments, according to the obvious and natural meaning of the words used, that it is

(*a*) 2 *Mad.* 65.
(*b*) 1 *Russ.* 430.
(*c*) 6 *Ves.* 499.
(*d*) 9 *Ves.* 428.

is not possible to come to any very satisfactory conclusion upon any case which varies at all from former decisions.

I have considered, I believe, all the cases upon this subject, and with that degree of hesitation which necessarily arises from this state of the authorities, I have come to the conclusion that, adopting the rule of Sir *W. Grant*, in *Howgrave* v. *Cartier* (*a*), I am bound to hold that the child dying before the father in this case, did not become entitled to any portion.

It was then contended, that the additional portion secured by the articles of 1787, and the settlement of 1788, was not subject to the same construction, but that the deceased daughter was entitled to a share of such additional portion. Upon considering these instruments, it does not appear to me that there is any ground for this claim. The articles of 1787 recite that the 2000*l.* is to be in addition to the 4000*l.*, and although they afterwards provide that it shall be paid to the daughters at twenty-one, or marriage, it is quite obvious that this is not to be taken literally, inasmuch as the estate for life of the father and mother would, of necessity, prevent this from taking effect; and the settlement of 1788, made by and between the same parties, puts the question out of all doubt, by providing that the 2000*l.* shall be raised and paid in the same manner, and at the same ages and times, as the 4000*l.* under the settlement of 1763.

I am, therefore, of opinion that, the claim to any share of the 4000*l.* failing, the claim to a share of the 2000*l.* must fail with it.

Upon

(*a*) 3 *V. & B.* 79.

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Upon the whole, therefore, I am of opinion, that the decree of the Vice-Chancellor was right, and that the appeal must be dismissed; and, notwithstanding the state of the decisions upon this subject, I think that the costs must follow the decision.

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1838. *March* 14. 23.

In the Matter of JOHN WELCH, a Lunatic, not found such by Inquisition.

And in the Matter of the Act 1 *W.* 4. *c.* 60.

New trustees appointed on petition under the act 1 *W.* 4. *c.* 60., in the stead of a lunatic, not found such by inquisition, to whom, together with two other persons since deceased, a sum of money charged by will upon real estates in the *West Indies*, and another sum secured by a bond, had been assigned by a deed, dated in 1802, upon certain trusts. A person at the same time appointed to assign the sums of money to the new trusteees.

THE Master, by his report, in pursuance of an order of reference made upon petition, found that, by a marriage settlement, dated the 8th of *May* 1802, the sum of 4000*l.*, charged by the will of *William Byam* upon his estates in *Antigua* in favour of his son *Samuel Byam*, and also a sum of 4000*l.* currency, or 2500*l.* sterling, secured by a bond, were assigned to Sir *George Bolton*, Knight, *Anthony Munton*, and *John Welch*, upon certain trusts; and that *John Welch* was a lunatic or person of unsound mind; and that the sum of 4000*l.*, referred to in the deed of 1802, as having been charged by the will of *Wm. Byam*, upon his *Antigua* estates, for the benefit of his son *Samuel Byam*, and the sum of 4000*l.* currency, or 2500*l.* sterling, secured by the bond, mentioned in the same deed, were then vested in *John Welch* alone, as surviving trustee thereof, upon the trusts of that indenture, such trusts being for the petitioners. And he was of opinion that, being such lunatic as aforesaid, and being also the surviving trustee of the said sums, he was such trustee within the intent and meaning of the before mentioned act of parliament: And he found

found that *John Welch* had not any beneficial interest therein, and it did not appear to him that there were any incumbrances affecting the same. And he found that there was not any power in the deed of 1802 or otherwise, to appoint a new trustee or trustees in the place of *John Welch*, being of unsound mind, as before-mentioned, of the aforesaid sums or either of them; and he therefore approved of four persons, whose names were mentioned in the report, as proper persons to be appointed trustees in the place of *John Welch*, of the sums so vested in him, and of another person, whose name was also mentioned in the report, as a proper person to be appointed in the place of *John Welch*, to assign the sums to the new trustees so approved.

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In the Matter of Welch.

A petition was now presented, praying that the Master's report might be confirmed, and that the persons approved by the Master as new trustees of the deed of 1802, might be appointed such new trustees accordingly, and that the person approved by the Master for that purpose might be ordered to assign the sums and interest to such new trustees.

Mr. *Sharpe* appeared in support of the petition.

*The* Lord Chancellor at first expressed some doubt whether the case was within the provisions of the act of parliament: but, on a subsequent day, his Lordship stated that, although that part of the act which related to such cases was obscure, yet, upon consideration, he was of opinion that the case was within the act, and that he had made the order.

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## BACON *v.* CLARK.

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*Nov.* 15.

In 1806, a husband at *Calcutta*, being desirous of making a provision for his wife and the issue of the marriage, entered into a bond to *A.* for payment to him of 10,000*l.*; and he, at the same time, conveyed an estate in the *East Indies* to *A.*, upon trust to sell it, and to raise the 10,000*l.*, or so much of it as the estate would produce: and it was provided by the deed of conveyance, that as soon as *A.*, his executors, &c. should have realised the net and clear sum of 10,000*l.* by means of the sale or of the bond, and should, at the request and direction of the husband and wife, or the survivor, in writing, first made for that purpose, have remitted the same to *England*, to *B.*, *C.*, and *D.*, in the best, and as to him, his executors, &c. should seem the most eligible manner, he should stand discharged of the trusts, and should not be answerable for the payment of the bills in which the same should be remitted: and it was declared that *B.*, *C.*, and *D.* should invest the money in government or real security, upon trust for the husband for life; with remainder for the wife for life; with remainder for the children of the marriage; and that *A.*, until the sale, should be seised of the premises, and, after the sale and until the monies should be remitted, should be interested in the proceeds, upon the same trusts as were before declared concerning the 10,000*l.* to be remitted to the trustees.

THIS was an appeal from a decree of the Vice-Chancellor. The facts of the case are sufficiently stated in the Lord Chancellor's judgment.

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*The* property was sold in the year 1811 for 145,000 sicca rupees, and the purchase money was, in 1813, received by *A.*'s house of business in *Calcutta*, who were the agents of the husband, and who then, by the direction of *A.*, set apart 80,000 sicca rupees, being then equal in value to 10,000*l.* sterling, and carried the same to the account of *A.* and another person, as trustees of the settlement, and held the remainder of the purchase money to answer the husband's drafts.

In 1818 *A.* retired from the house of business. In 1825 he died. In 1826 the husband requested the surviving partners of *A.* to invest the 80,000 sicca rupees in a note of the *East India* Company, which they did, in the names of their firm. In 1827 the husband died. In 1832 the wife required *A.*'s executors, who were in *England*, to procure a remittance of the 10,000*l.* to *England*; whereupon they directed the house of business to transmit that amount in bills, payable to *B.* and *D.*; *C.* being dead. The house of business thereupon sold the note of the *East India* Company, and drew a bill upon their correspondents in *London*, payable to *A.*'s executors: but, before the bill became due, both the house in *Calcutta* and their correspondents in *London* had failed, and the bill was never paid. Except as before mentioned, no request was ever made by the husband and wife, or the survivor, to remit the money.

Upon a bill by the children of the marriage against *A.*'s executors, it was held that *A.*'s estate was liable to make good the sum of 10,000*l.* sterling.

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The decree of the Vice-Chancellor declares that the estate of *William Fairlie* is liable to make good a sum of 10,000*l.*, and gives the usual directions to enforce the payment of it. The question upon the appeal is, whether *W. Fairlie's* estate is liable to the payment of this sum.

*W. Fairlie* was a trustee under a deed of settlement of the 12th of *August* 1806. It appears, from the recitals in that deed, that *John Fergusson Bacon*, who was then at *Calcutta*, and had certain property there, which he was desirous of selling, discharged of his wife's dower, procured her to levy a fine for that purpose; and, as a compensation to her, agreed with *W. Fairlie* as her trustee, that he would forthwith, or as soon as conveniently might be, raise a sum of 10,000*l.*, and settle the same upon her and the issue of the marriage, and that, in order to raise that sum, he had agreed to appoint the property of which the fine had been so levied, to *W. Fairlie*, in trust to sell, as after directed, and to execute a bond to him in 160,000 sicca rupees, for making good any deficiency, and to secure to Mrs. *Bacon* and the issue of the marriage the net and clear sum of 10,000*l.* The deed then proceeded to appoint and convey the premises to *W. Fairlie* in fee, upon trust to sell the same as soon as conveniently might be, for the purpose of raising the said sum of 10,000*l.*, or so much as the premises would produce, with the usual powers to give receipts for the purchase money: and it was provided that as soon as *W. Fairlie*, his heirs, executors, administrators, or assigns, should have realised the net and clear sum of 10,000*l.* by means of the sale of the premises or by means of the bond, and should, at the request and direction of Mr. and Mrs. *Bacon*, in writing

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writing under their hands or the hand of the survivor for that purpose being to him first made, have remitted the same to *England* to *Henry Slade*, *John Davis*, and *John Slade*, or the survivor of them, or the executors or administrators of such survivor, in the best, and, as to him, his heirs, executors, administrators, and assigns should seem the most eligible manner, then and immediately after, he, *W. Fairlie*, his heirs, executors, and administrators should stand discharged of the trusts, and should not be answerable for the payment of the bill or bills in or on which the same should be remitted, or for any loss or misapplication or non-application of the said sum of 10,000*l.* further than for his or their wilful default or neglect. And it was declared that *Henry Slade*, *John Davis*, and *John Slade*, when they should have received the 10,000*l.*, should, with all convenient speed, invest the same in government or real security, upon trust for Mrs. *Bacon* for life, with remainder upon trust for their children, equally, at twenty-one, or marriage of daughters. And it was declared that *W. Fairlie* should, until the sale be seised of the premises, and after the sale, and until the money to arise from the sale should be remitted as aforesaid, should stand interested in the proceeds upon the same trusts, and for the same intents and purposes as before expressed and declared of and concerning the 10,000*l.* so to be remitted to the trustees.

In execution of these trusts, *W. Fairlie* sold the property in the year 1811, though the purchase of the whole was not completed until the year 1813, and the proceeds amounted to above 145,000 sicca rupees, which much exceeded the value of the 10,000*l.*, the rate of exchange being admitted to have been at that time at 2*s.* 6*d.* the sicca rupee. In 1825 *W. Fairlie* died, and the Defendants, *David Clark*, *John Innes*, and *James Fairlie*, are his

his executors. In the year 1827 *John Fergusson Bacon*, the settlor and tenant for life, died. The Plaintiffs are the only children of the marriage. The 10,000*l.* never was remitted to *Henry Slade*, *John Davis*, and *John Slade*, and the Plaintiffs therefore call upon the executors of *William Fairlie* to pay the 10,000*l.*

Such is the *primâ facie* case of the Plaintiffs, which, if the Defendants cannot shew good ground for the discharge of the estate of *William Fairlie* from this liability, undoubtedly entitles them to the decree which has been pronounced.

The circumstances upon which the defence is founded, are the following. — That *W. Fairlie* was a partner in the house of *Fairlie*, *Fergusson*, and Co., of *Calcutta*, which firm were the agents at *Calcutta* of Mr. *Bacon*: that *W. Fairlie* was himself in *England* at the time of the sale; and that, upon the completion of the sale, in the year 1813, a sum of 80,000 sicca rupees, being then of the value of 10,000*l.*, was, by the direction of *W. Fairlie*, set apart by *Fairlie*, *Fergusson*, and Co., out of the proceeds of the sale received by them, and carried to an account of *W. Fairlie* and *Hugh Reid*, trustees of the settlement: that the 80,000 sicca rupees continued on that account in 1818, when *W. Fairlie* retired from the firm, and until 1826, when, at the request of Mr. *Bacon*, Messrs. *Fergusson* and Co. invested it in a note of the *East India* Company, of 80,000 sicca rupees, in the names of the partners in the house of *Fergusson* and Co., and not of the trustees of the 10,000*l.*: that, in 1832, Mrs. *Bacon* having called upon the executors of *W. Fairlie* to procure a remittance to this country of the 10,000*l.*, they directed the house of *Fergusson* and Co. to do so, in bills payable to *Henry Slade* and *John Slade*, the surviving trustees: that the house of *Fergusson* and

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Co. thereupon sold the note of the *East India* Company, and drew a bill (*a*) upon the firm, in *London*, of *Fairlie, Clark, Innes*, and Co., payable to the executors of *W. Fairlie*; but, before the bill arrived, the drawees, *Fairlie, Clark, Innes*, and Co., had stopped payment, and *Fergusson* and Co., the drawers, also failed (*b*), so that nothing has been received from that bill. These facts are all stated in parts of the answer read by the Plaintiffs; and there was also read a letter from *W. Fairlie*, to *Fairlie, Fergusson*, and Co., dated the 20th of *May* 1812, directing them to transfer a sum equal to 10,000*l.* into the name of the trustee of the settlement, being himself (*c*), and to hold the residue to answer Mr. *Bacon*'s drafts.

Upon this state of facts, three points were made for the Defendants: — 1. That no breach of trust had been committed by *W. Fairlie*. 2. If there had, that it was cured by the purchase of the *East India* Company's note. 3. That the rights of the Plaintiffs were limited to such an amount of pounds sterling as the 80,000 sicca rupees, set apart in 1813, are now equal to, and that they are not entitled to demand the whole 10,000*l.*

The first point does not appear to me to be very important, because, whether a breach of trust was committed or not, as *W. Fairlie* received the proceeds of the property out of which the 10,000*l.* was to be paid, his estate must remain liable to pay what is due in respect of that sum, unless payment or a sufficient excuse

(*a*) This bill was for 7979*l.* 1*s.* 9*d.* being the value of 80,000 sicca rupees, according to the then rate of exchange (1*s.* 11*d.*), and certain interest.

(*b*) Before the bill became due.

(*c*) The expression in the letter was, "Let the transfer of the 10,000*l.* be made in the name of the trustees for the settlement; I believe Captain *Reid* and myself."

excuse for non-payment can be shewn; but I have not any doubt of a breach of trust having been committed. *W. Fairlie*, who was solely entitled to receive the proceeds of the sale, and out of them to appropriate the 10,000*l.*, permits, in the year 1813, the house in which he was a partner to receive the money, and to hold it till his death in 1825, and even after he quitted the firm in 1818. Either this was his possession, in which case what happened to that firm is immaterial; or it was a lending the trust money to this company, without security, which would clearly be a breach of trust. It was said that he could not remit the trust money without the direction of Mr. and Mrs. *Bacon*; but it is to be observed that, by the deed, he had no right to appropriate the 10,000*l.*, and to separate it from the rest of the proceeds of the sale, except for the purpose of remitting it to the trustees; for until that was done, he was to hold the proceeds subject to the same trusts as were declared of the 10,000*l.*; that is, the whole proceeds were to be liable to the payment of the 10,000*l.* until it was actually remitted. This, if acted upon, would have insured the direction to remit from Mr. *Bacon*. The payment to *Fairlie, Fergusson*, and Co., or permitting them to receive and retain the proceeds of the sale; the appropriation of the 10,000*l.* by them under the direction of *W. Fairlie*; the payment of the interest to Mr. *Bacon*, and the payment to him of the residue of the proceeds, were all in direct violation of *W. Fairlie*'s duty as trustee, and each constituted a breach of trust; and this view of the trusts of the deed at once disposes of the point that the Plaintiffs' title is not to 10,000*l.*, but to the proceeds of 80,000 sicca rupees so appropriated. It is quite clear to me that the whole proceeds of the estate were to be liable to realise the 10,000*l.* when it should be remitted, and, consequently, that the Plaintiffs are entitled to have that sum realised in this country at this time.

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But then it is said that the purchase of the note of the *East India* Company cured all former omissions or breaches of trust, because, when that took place, the fund was in a proper state of investment. Whether such a mode of investment would, under any circumstances, be a discharge, need not be considered; because if *W. Fairlie* was, at the time of his death, personally liable to realise the 10,000*l.* in this country, as I think he certainly was, his estate must remain liable to that debt, unless his representatives can shew payment or something equivalent to it. How then can an act of the house of *Fergusson* and Co., acting under the direction of Mr. *Bacon* after *W. Fairlie*'s death, which did not lead to any payment of this debt, operate as a discharge of his estate from this debt? The security was taken by *Fergusson* and Co., who were strangers to the trust, in their own names; and they sold the security, and received the proceeds. Similar observations apply to the bill drawn by *Fergusson* and Co. upon *Fairlie, Clarke, Innes*, and Co., in *London*.

The deed undoubtedly intended to protect the trustee, *W. Fairlie*, if, acting to the best of his judgment, he had purchased a bill of good credit upon *England* for the purpose of remitting the 10,000*l.*; but the bill in question was not drawn by him or by his representatives, and could not, at the time, have been a bill entitled to any credit, and it was not a bill purchased with the trust fund, but a mode adopted by the debtor for payment, which failed, and which therefore left the debt as before. *W. Fairlie*, in violation of his duty as trustee, and in breach of his trust, permitted the trust fund to remain in the hands of private traders, Messrs. *Fergusson* and Co., and in their hands it has been lost; their buying and afterwards selling the *East India* Company's bill, and their bill drawn upon the *London* house, which was never paid,

are transactions from which the estate of *W. Fairlie* can derive no protection. Had those transactions operated to reproduce the trust fund, they would, *pro tanto*, have released his estate, by satisfying the demand upon it; but, as they were wholly unprofitable for that purpose, that liability remains unaffected by them.

I have, therefore, no hesitation in affirming the Vice-Chancellor's decree with costs.

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Mr. *Treslove*, Mr. *Koe*, and Mr. *Hallett*, for the Plaintiffs.

The *Solicitor-General* and Mr. *Blunt*, for the Defendants, the executors of *Fairlie*.

Mr. *Wakefield*, and Mr. *Purvis*, for Mrs. *Bacon* the widow.

Mr. *W. Robertson*, for the trustees, *Henry Slade* and *John Slade* (now Sir *John Slade*).

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*Aug.* 5. 7, 8.

## LEE *v.* LOCKHART.

## WILD *v.* LOCKHART.

*C.*, having an interest in a sum of 10,000*l.*, subject to a mortgage made by himself to *D.*, and having also other property subject to mortgages, assigns the 10,000*l.*, subject to the mortgage to *D.*, and also the other property, subject to the mortgages affecting it, to trustees, upon trust to pay the mortgages affecting both, and to divide the surplus among the other creditors of *C.*; and, by the same deed, *C.*'s creditors release him from all demands in respect of their debts. *D.* being applied to by *C.* to execute this deed, refuses to do so unless his mortgage security upon the 10,000*l.* is preserved; and *C.*'s solicitors, one of whom, *T.*, is a trustee under the trust deed, prepare a memorandum, which is indorsed on the deed, and which declares that *D.*, by executing the deed, shall not affect his mortgage security upon the 10,000*l.*

*D.* then executes the deed, and at the same time signs the indorsement, which is also signed by *T.* There was no reason to suppose that this indorsement was, or was intended to be, concealed from any of the other creditors who executed the trust deed:

Held, that *D.* did not waive his rights or remedies as mortgagee of the 10,000*l.*

BY indentures of lease and release, dated the 14th and 15th of *August* 1778, in consideration of the sum of 10,000*l.*, expressed to be paid to Lord *Delaval* (then Sir *John Hussey Delaval*), by the Earl of *Beverley* (then Lord *Algernon Percy*) and Sir *George Warren*, Lord *Delaval* conveyed certain real estates to the Earl of *Beverley* and Sir *George Warren*, in fee, subject to a proviso for redemption, on payment by Lord *Delaval* of the sum of 10,000*l.* and interest.

By an indenture of settlement, also dated the 15th of *August* 1778, and made on the marriage of *John Fenton Cawthorne* with *Frances Delaval*, the daughter of Lord *Delaval*, and to which the Earl of *Beverley* and Sir *George Warren*, as well as Lord *Delaval*, were parties, it was declared that the before-mentioned sum of 10,000*l.* was not, in fact, paid by the Earl of *Beverley* and Sir *George Warren*, and was not their money; but that, upon the treaty for the marriage, it had been agreed that that sum should be applied upon the trusts declared by the present deed. It was, therefore, declared, that the Earl of *Beverley*

*Beverley* and Sir *George Warren* should stand possessed of the 10,000*l.*, upon trust for *Frances Delaval* and *John Fenton Cawthorne*, during their respective lives, as therein mentioned; and, after the decease of the survivor, upon certain trusts for the benefit of the children of the marriage; and in case no child of the marriage should live to attain a vested interest, then upon trust for *John Fenton Cawthorne*, his executors, administrators, and assigns.

By an indenture of assignment, dated the 27th of *May* 1780, and made between *J. F. Cawthorne* of the one part, and Lord *Delaval* of the other part, after reciting that on the 25th of *May* 1779, Lord *Delaval* lent *Cawthorne* 2000*l.*, and that, for the purpose of securing the repayment of that sum, with interest at 5 per cent., *Cawthorne* had given Lord *Delaval* a bond, dated the 25th of *May* 1779, in the penal sum of 4000*l.*; and reciting that this sum of 2000*l.*, and all interest thereof, still remained due; and reciting that Lord *Delaval* had, on the date of the present indenture, lent *Cawthorne* the further sum of 1000*l.*, and that, for the purpose of securing the repayment of that sum with interest at 5 per cent., *Cawthorne* had given Lord *Delaval* another bond of even date with the present indenture, in the penal sum of 2000*l.*; and reciting the before-mentioned mortgage deed, and the marriage settlement, and the marriage, and that at the time of advancing the 1000*l.*, it was agreed that such further security should be given for that sum and interest, and for the sum of 2000*l.* and interest, as was after contained: it was witnessed, that *Cawthorne* assigned to Lord *Delaval* all that the sum of 10,000*l.* secured by the therein-recited mortgage, and all such interest as should become payable to *Cawthorne* under the trusts of the marriage settlement, subject to a proviso for redemption, upon

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payment of the sums of 2000*l.* and 1000*l.* and interest. It was also witnessed, that *Cawthorne* directed that the Earl of *Beverley* and Sir *G. Warren* should, after *Cawthorne*, his executors or administrators, should become entitled to the 10,000*l.*, or any part of it, or the interest or produce of it, stand possessed of that sum and interest, and the securities for the same, upon trust, in the first place, to pay Lord *Delaval* the several sums of 2000*l.* and 1000*l.*, and all interest due and to grow due for the same respectively, and subject thereto, in trust for *Cawthorne*.

By an indenture of release and assignment, bearing date the 21st of *June* 1797, made between *John Fenton Cawthorne* of the first part; *John Ingram Lockhart*, *James Barrow*, *George Tennant*, and *John Dowbiggin* of the second part; and the several persons whose names and seals were thereunto subscribed and affixed (being creditors of *J. F. Cawthorne*) of the third part, reciting that *Cawthorne* was indebted to the several persons, parties of the third part, in the several sums of money set opposite to their respective names; and reciting that *Cawthorne* was seized in fee of the hereditaments mentioned in the first schedule annexed to the present deed, subject to the mortgages and incumbrances therein mentioned; and that the hereditaments mentioned in the second schedule to the same deed were subject to the uses and trusts of his marriage settlement; and that his estate and interest in the settled hereditaments were comprised in certain of the said mortgage securities; and reciting the before-mentioned settlement of the 10,000*l.*, but that the estate and interest of *Cawthorne* were charged with the payment of the sum of 3,000*l.* and interest to Lord *Delaval*, by the indenture of the 27th of *May* 1780; and reciting that *Cawthorne*, in order to make a provision for payment of his debts, had agreed to convey and

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and assign all his real estates specified in the schedules, or either of them, and also all his interest in the 10,000*l.*, to trustees, for the benefit of his creditors, in manner after mentioned; and that, in consideration of such his proposal, *Lockhart*, *Barrow*, *Tennant*, and *Dowbiggin*, and also the several other persons, parties thereto, of the third part, creditors of *Cawthorne*, had consented to give such release, and to enter into such agreements, covenants, and declarations as therein-after contained: it was witnessed, that *Cawthorne* conveyed to *Lockhart*, *Barrow*, *Tennant*, and *Dowbiggin*, and their heirs, the several hereditaments comprised in the first and second schedules; to hold the same, subject, as to the hereditaments comprised in the second schedule, to certain uses and trusts declared by the marriage settlement, and also subject to the several mortgages, legacies, charges, and incumbrances, which respectively affected the hereditaments thereby granted and released, to and to the use of *Lockhart*, *Barrow*, *Tennant*, and *Dowbiggin*, their heirs and assigns. And it was further witnessed, that *Cawthorne* assigned to the same persons the before-mentioned sum of 10,000*l.* to which he was entitled, subject to the estate and interest therein of his wife, and to the estates, interests, and claims thereupon, of any child or children of the marriage; and subject also to the indenture of the 27th of *May* 1780, for securing to Lord *Delaval* the said sum of 3000*l.* and interest. It was then declared that *Lockhart*, *Barrow*, *Tennant*, and *Dowbiggin* should stand seized of the hereditaments comprised in the first schedule, upon trust to receive the rents, or to mortgage and sell, and to stand possessed of the monies thereby arising upon trust to pay certain costs and expenses, and then certain principal monies and legacies, and then to discharge such of the mortgages and other incumbrances as affected the title of what should be sold, according to the priority of such debts, legacies, mortgages, and incumbrances; and

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and after payment and satisfaction of the said sums respectively, to pay and divide whatsoever should remain of the monies so to be raised, equally to and amongst the several other just creditors of *Cawthorne*, parties thereto, by an equal pound rate, according to the amount of their respective debts at the date of the present deed, as far as such money would extend to pay the same; and should stand seized of the hereditaments comprised in the second schedule upon certain trusts therein declared; and, amongst others, to raise an annuity and pay the same among the creditors of *Cawthorne*, parties to the deed, in manner before mentioned. And it was declared that the trustees should, after the decease of *Cawthorne*, and after the decease of his wife, and failure of the issue of the marriage entitled to the 10,000*l.*, which should first happen before all the said debts should have been paid or satisfied, call in and compel payment of all and whatsoever should then remain due and payable in respect of the before-mentioned sum of 10,000*l.* in manner after mentioned. The deed then contained certain trusts for raising, in certain events, a sum of 6000*l.* instead of the annuity before-mentioned. And it was declared that the trustees should stand possessed of the 6000*l.*, and of the sum or sums to be received in respect of the 10,000*l.*, upon trust, in the first place to pay the mortgage debts, legacies, and other incumbrances affecting the hereditaments and premises thereby released, and after payment thereof to apply the same in payment of the other creditors, parties thereto, equally, and without preference or priority, in manner thereinbefore directed.

The deed further witnessed, that all the creditors, who had sealed and delivered the present deed, did severally and respectively release to *Cawthorne*, his heirs, executors, and administrators, all actions, suits, bills, bonds, obligations, debts, dues, duties, accounts, sums of

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*of* money, judgments, extents, executions, trespasses, trusts, claims, and demands whatsoever, both at law and in equity, or otherwise howsoever, which they then had, or should or might have, challenge, claim or demand against *Cawthorne*, his heirs, executors, or administrators, or his or their estates or effects, or any of them, other than the premises in the present indenture contained, for or by reason or means, or on account of the debts to them or any of them respectively then due and owing from *Cawthorne*, or of any other matter, cause, or thing whatsoever; and it was provided that, notwithstanding any thing therein contained, when and as often as any monies should be received by the trustees in respect of the trust estates and premises, the same should be subject to the trusts aforesaid, and after first satisfying and discharging thereout the said mortgages and prior charges and incumbrances, become distributable, and should be, from time to time, when and as occasion might require, divided, in such manner as should form and make an equal pound rate upon all the debts justly due and owing by *Cawthorne* to his several creditors, whose debts should be by the trustees for the time being admitted to be justly due and owing on the day of the date of the present indenture.

This deed was executed by various creditors of *Cawthorne*, and, amongst others, by Lord *Delaval*, as a creditor for the sum of 4825*l.*, including the amount of the two sums of 2000*l.* and 1000*l.* and interest. (*a*) On the first skin of the deed was endorsed a memorandum which was signed by Lord *Delaval*, and by Mr. *Tennant* one of the trustees, and was in the following words: —

"Memo-

(*a*) It appeared that this sum of 4825*l.* included also a further sum of 200*l.* lent by Lord *Delaval* to *Cawthorne*.

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"Memorandum: — At the time of the execution of the within-written indenture it was expressly understood and agreed that the sum of 10,000*l.*, mentioned within, as secured for the benefit of the within-named *John Fenton Cawthorne* and *Frances* his wife, and which is, as within mentioned, made a further or collateral security for a sum of 3000*l.*, and a large arrear of interest now due upon the bonds of the said *John Fenton Cawthorne* to the said *John* Lord *Delaval*, shall remain and continue charged with and liable to the payment of the said 3000*l.*, and all interest now due and hereafter to grow due for the same; and that so much of the said 3000*l.* and interest as shall, after deducting all dividends to be made in respect of the said 3000*l.* and interest, under or by virtue of the within-written indenture, such dividends being first applied in discharge of interest due and to grow due in respect of the said 3000*l.* [remain unpaid] when the said 10,000*l.* shall become due and payable to the said *John Fenton Cawthorne* or his executors, administrators, or assigns, in case the same shall ever become so due and payable, shall be deducted and retained by the said *John* Lord *Delaval* out of the said 10,000*l.* and interest; and that nothing contained in the within-written indenture shall in anywise prejudice or affect any security or securities which the said *John* Lord *Delaval* hath for the 3000*l.* and interest."

The memorandum was signed by Lord *Delaval* at the same time at which he executed the deed.

Mr. *Tennant* was a solicitor, and a partner in the firm of *Greene* and *Tennant*, who were the solicitors of *Cawthorne*, and, as such, were employed in obtaining the signatures of several of his creditors to the trust deed of 1797. Messrs. *Greene* and *Tennant* accordingly applied to the solicitors of Lord *Delaval*, to obtain his signature

signature to the deed; but Lord *Delaval*, by the advice of his solicitors, declined to execute it, unless his rights and remedies as mortgagee under the indenture of the 27th of *May* 1780 were preserved; and on the 10th of *July* 1797 Lord *Delaval*'s solicitors received from Messrs. *Greene* and *Tennant* a letter, in the handwriting of Mr. *Tennant*, in the following terms: —

"*Cawthorne*'s Trust Deed. — Messrs. *Greene* and *Tennant*'s compliments to Mr. *Farrer*, and send him enclosed such a memorandum to be endorsed on the deed as will leave Lord *Delaval* in the full possession of every benefit to be derived from his security, and which they trust his Lordship and Mr. *Farrer* will think sufficient. *Gray's Inn, July* 10. 1797."

The before-mentioned memorandum was accordingly endorsed on the deed by, or by direction of, Messrs. *Greene* and *Tennant*. In the books of Messrs. *Greene* and *Tennant*, between entries of the 21st of *June* 1797, and the 17th of *July* 1797, was an entry in the following terms: "Attendances on Mr. *Farrer* to fix and ascertain Lord *Delaval*'s debt, and writing letters; and at length finally settling about the same; and the draft of a special memorandum to be endorsed, and endorsing same."

The decree in these causes having referred it to the master to enquire what debts, under the deed of the 21st of *June* 1797, and what other charges, mortgages and incumbrances, there were affecting the hereditaments mentioned in the pleadings, and the before-mentioned sum of 10,000*l.*, the representatives of Lord *Delaval*, on the 25th of *May* 1835, carried in a claim upon that sum of 10,000*l.* for the sum of 10,299*l.* 14*s.* 6*d.*, as being then due, for principal and interest, in respect of the two before-mentioned debts of 2000*l.* and 1000*l.*, after

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after giving credit for several sums received by Lord *Delaval* on account of interest. The master disallowed the claim, conceiving that Lord *Delaval*, by executing the deed of the 21st of *June* 1797, in manner before-mentioned, waived all his rights and remedies as a mortgagee of the 10,000*l.* under the deed of the 27th of *May* 1780; but he made a separate report, stating all the facts before mentioned.

The case came before the Master of the Rolls upon three exceptions to the report, and upon a petition, presented by the representatives of Lord *Delaval*, praying that provision might be made for satisfying their debt. The Master of the Rolls referred it back to the master to review his report upon the second and third exceptions, without prejudice to any question between the parties in the causes, and ordered the petition to stand over in the mean time. This order not being satisfactory to Lord *Delaval*'s representatives, they presented a petition of appeal to the Lord Chancellor, praying that the second and third exceptions and their former petition might be re-heard.

Mr. *Wigram* and Mr. *Sidebottom* supported the claim of Lord *Delaval*'s representatives.

Mr. *Walker* and Mr. *Sharpe*, on the part of the plaintiff, opposed it.

Mr. *Tinney*, Mr. *Simpkinson*, Mr. *Duckworth*, Mr. *Ellis*, Mr. *Geldart*, Mr. *Tennant*, and Mr. *J. Russell* appeared for the other parties.

It was contended that the memorandum endorsed on the trust deed was fraudulent, illegal, and void, as against the creditors; and the cases of *Cockshott* v. *Bennett*,

*Bennett* (*a*), *Leicester* v. *Rose* (*b*), *Jackman* v. *Mitchell* (*c*), *Ex parte Sadler and Jackson* (*d*), and *Spurret* v. *Spiller* (*e*) were referred to in support of this position. It was also argued that the amount of Lord *Delaval*'s debt must be confined to the penalty of the bonds given to him.

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*The* LORD CHANCELLOR. *Aug.* 8.

It appears that by Mr. *Cawthorne*'s marriage settlement, in the year 1778, a sum of 10,000*l.* was settled upon certain trusts, under which, after his own death and the death of his wife, and failure of issue of the marriage, he would have himself an absolute interest; and by deed of the 27th of *May* 1780, he made this contingent interest in the capital of the 10,000*l.* the subject of a charge, for the purpose of securing the payment of a sum of money due to Lord *Delaval*. A question was raised whether the debt now due to Lord *Delaval* was or not to be confined to the penalty of the bonds; but, looking at the terms of the deed of 1780, I see no ground whatever to support the affirmative of that proposition, inasmuch as that charge is made for the sums which had been advanced, and all interest due and to grow due for the same, and the fund is made redeemable upon payment of those sums and all interest. The bonds were collateral securities, and cannot cut down the security of the deed, which was for principal and interest.

It appears that that deed was executed in the year 1780, and it is obvious that at that time, only two years after the marriage, this was a very remote and contingent property, and not very likely to be available for the purpose

(*a*) 2 *T. R.* 763.
(*b*) 4 *East*, 372.
(*c*) 13 *Ves.* 581.
(*d*) 15 *Ves.* 52.
(*e*) 1 *Atk.* 105.

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pose of securing what it purported to secure. The lives were then young, and it was not at all certain that there would not be children of the marriage; but, in 1797, nineteen years had elapsed since the marriage; the lives having become seventeen years older, therefore, than at the time of the security of 1780; and, that period having elapsed without their having had any children, it was an infinitely more valuable security.

Now, that trust deed of 1797 is the deed upon which the question depends. It appears that Mr. *Cawthorne*'s property was subject to some debts and mortgages not of his own creating, and for which, therefore, he was not personally liable; and to some legacies; and also to some mortgages and judgments of his own creating, and for which, therefore, he was personally liable. His interest in the 10,000*l.* was an interest subject to the charge which he had before created in favour of Lord *Delaval*. The trust deed, first of all, recites his title to the real estates, and the charges due upon those estates for which he was not personally liable, and the others for which he was personally liable; and it also recites his title to the 10,000*l.*, and expressly recites the charge upon that sum created by the deed of 1780, and recites the intention of assigning all *Cawthorne*'s interest in the 10,000*l.*; and then conveys the real estates, subject to the mortgages and charges, and assigns the 10,000*l.*, subject to Lord *Delaval*'s mortgage security for 3000*l.* and interest. The property conveyed and assigned, therefore, was not the property discharged of the mortgages, but that which was the property of Mr. *Cawthorne*, subject to the charges then existing; and yet the trusts of the land are to pay the mortgages, not only those due upon the land, which were not personal charges of Mr. *Cawthorne*, but also those which were so; and the deed directs the surplus to be divided among his other creditors

*pro*

*pro ratâ*: the expression is "other creditors." It provides, *first*, for the payment of the sums due upon the security of *the* estates, and for which he was not personally liable; and then, — the property conveyed being property subject to mortgages and judgments of his own creation, — it provides for the discharge of them; clearly, therefore not contemplating even those mortgagees who were creditors of Mr. *Cawthorne* personally as creditors who were to participate in the monies to arise under the trusts of this deed. In short, they could not be the creditors intended, because, if the trusts were carried into execution, and there were any thing to divide, it would not be amongst them. Then the trust, as to the 10,000*l.*, is in these terms; to call in and compel payment of all and whatsoever should then remain due and payable in respect of the 10,000*l.* — To get in what remains of the 10,000*l.* must, I presume, have had reference to Lord *Delaval*'s claim, because the whole had been assigned, and there was no reason why the sum should be reduced, except by payment of the charge to Lord *Delaval*. Then there is a clause embracing the whole of the 10,000*l.*; and the trusts of it were to pay the mortgage debts and other incumbrances affecting the premises — the premises being the landed estates as well as the 10,000*l.* — and to divide the surplus among the other creditors, as before.

Now, if that clause were confined to the 10,000*l.*, it would be quite clear that Lord *Delaval* was not intended to be included in the description of the "other creditors," and I think it equally clear, that it was intended that his debt should be paid out of the 10,000*l.*, and that it was not contemplated that he should be a creditor for the purpose of coming in under the trust deed, and participating in the trust funds. The creditors were made, by the deed, to release all debts, trusts, or claims against

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*Cawthorne*, or his estate or effects, other than the premises. The premises therein comprised were not the 10,000*l.*, but the 10,000*l.* subject to the payment of the claims of Lord *Delaval;* and then there is a proviso, which makes it quite clear that it was intended that Lord *Delaval* should be paid out of the 10,000*l.*, and that he was not to come in as a creditor, viz. the proviso that all monies received from the trust premises (of which the 10,000*l.* was part) should, after first satisfying and discharging thereout the said mortgages, prior charges, and incumbrances, be distributed, *pro ratâ*, amongst creditors who should be admitted by the trustees. That is a general proviso, applicable to all the trust funds, of which the 10,000*l.* was part, and the meaning is that all the incumbrances on the property should be paid, and the surplus divided; that is, clearly, amongst creditors remaining unpaid, and excluding creditors having charges upon the property, who would receive payment out of the specific property which was the subject of the charge. Then there is a provision that creditors having notes should give them up, but none that creditors having charges or mortgages should give up their securities.

From this it appears clear that neither the mortgagees of the land, nor Lord *Delaval* as mortgagee of the 10,000*l.*, were contemplated as parties who would come in under the trust deed.

Both descriptions of property were vested in the trustees, subject to the mortgages and charges. The trusts of both were to pay the mortgagees, and to divide the surplus among the other creditors.

The first trust was to pay the mortgagees, which could not be, if the mortgagees were to release their mortgages. The holders of notes were to give them up,

up, but there was no such provision as to mortgagees. Therefore, though the release would, in its terms, discharge the mortgage, if a mortgagee, executed the deed, it is clear that this was not intended to apply to them, and therefore clear that there was no contract or common purpose between the mortgagees and the other creditors. Messrs. *Greene* and *Tennant*, however, as solicitors for Mr. *Cawthorne*, applied to Messrs. *Farrer* and *Atkinson*, Lord *Delaval*'s solicitors, to get him to sign. He declined, unless his security under the deed of 1780 was preserved. *Greene* and *Tennant* prepared the indorsement, stating that it would have the effect of securing the mortgage upon the 10,000*l*. On that representation and assurance he did execute the deed, at the same time signing the indorsement, the object of which was to keep alive the security which he then had under the deed of 1780. Those who now represent Mr. *Cawthorne* insist that the effect of Lord *Delaval*'s executing the deed was to destroy his security under the deed of 1780, and that the representations and promises under which he was induced to do so, are to be rejected at their application. If the mortgage be affected, it is clearly from misapprehension on both sides. There was no intention to keep the transaction secret; the best proof of which is that the indorsement was made on the deed itself.

*Jackman* v. *Mitchell* (*a*) was cited in support of Mr. *Cawthorne*'s case. That case decided that a bond given to secure the deficiency of a trust fund, under a composition deed, was void; and it is so both at law and in equity. There is no question here as to any additional security being void, but whether an existing security, namely, that of 1780, shall be held void under the terms of the release of the trust deed, all parties having concurred

(*a*) 13 *Ves.* 581.

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concurred in agreeing that it should not. What Lord *Delaval* did by signing did not alter the situation of the creditors. They never looked to more than the 10,000*l.*, subject to his mortgage; nor was there any secresy, or intention of putting them in a worse situation. Lord *Eldon*, in that case, said the instrument was bad, only because it was proved that it was intended to be kept secret. *Ex parte Sadler and Jackson* (*a*) is upon the same principle; and there Lord *Eldon* offered an inquiry whether the additional security was known to the creditors. *Leicester* v. *Rose* (*b*) is founded upon the same principle, that is, that the security sought to be enforced operated as a fraud upon the other creditors. Here, the security sought to be enforced is the deed of 1780, the existence and validity of which are recognized by the trust deed, and provision made by it for carrying the objects of it into effect.

The decisions referred to proceed upon clear intelligible principles; but they do not appear to me to have any application to the present case, in which the only question is whether a person having a valid security for his debt, but induced by the debtor to execute an instrument legally affecting such security, under a representation that such would not be the effect, and a promise that it should not, is, upon the application of such debtor, to be held to be deprived of such original security. I am clearly of opinion that he cannot be considered as so deprived. It was contended that he has waited till the value of the security has improved, before he raised this question. Of the conduct of the parties, debtor and creditor, or how far the trust deed has been acted upon, I have no information, the Master having grounded his finding upon the simple fact of Lord

(*a*) 15 *Ves.* 52. (*b*) 4 *East*, 372.

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Lord *Delaval* having executed the trust deed. Differing, as I do, from the Master, in his conclusion upon this simple fact, and having no information from the report as to any other part of the case, and being of opinion that it will be much more convenient and less liable to error that the whole of the inquiries directed by the decree should be answered, before the Court pronounces any final judgment, beyond the question raised by the report, I think that the proper order upon the second and third exceptions will be to declare that Lord *Delaval* ought not, under the circumstances, to be considered as having, by executing the deed and signing the memorandum, waived his rights and remedies as mortgagee of the sum of 10,000*l.* under the deed of the 27th of *May* 1780, and with this declaration to refer it back to the Master to review his report, and to include his finding thereon in his general report.

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## OLDHAM *v.* STONEHOUSE.

1838. *Jan.* 15, 16, 18.

A decree having been made in the court below against the Defendants with costs, the Lord Chancellor, upon a petition of appeal against the whole decree presented by the Plaintiff, expressed his opinion that the bill ought to have been dismissed with costs; and he gave the Defendants their costs of the cause, up to the hearing, but not the costs of the appeal.

AT the hearing of this cause the Vice-Chancellor made a decree, by which the Plaintiff was declared to be entitled to a certain kind of relief, differing from that which was prayed by the bill; and he ordered the Defendants to pay the costs. The Plaintiff, being dissatisfied with that decree, presented a petition of appeal against the whole decree; and, upon argument, the Lord Chancellor was clearly of opinion that the decree complained of could not stand, inasmuch as it was inconsistent with the scope and frame of the bill; and further,

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further, that upon the case made by the pleadings, and upon the evidence in the cause, the Plaintiff was not entitled to any decree whatever, and that his bill ought therefore to have been dismissed with costs.

Such being his Lordship's judgment upon the merits, the question then arose, how far, upon an appeal by a party who succeeded in obtaining a reversal of the decree complained of, the Court was at liberty, or would be disposed to make any order against him as to costs, where the decree of the Court below had given him his costs.

Mr. *Knight Bruce* and Mr. *Koe*, for the Plaintiff, who appealed.

Mr. *Wigram* and Mr. *Lloyd*, Mr. *Spence* and Mr. *Jacob*, for different Defendants.

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*January* 18. *The* LORD CHANCELLOR (after shortly stating the facts).

The Vice-Chancellor, acting upon a particular view of the case, made a certain decree, and in conformity with that view, directed the Defendants to pay the costs. The Plaintiff, not satisfied with that result, has succeeded in shewing the Court of appeal that a different view of the case might and ought to have been taken, and that no decree ought to have been made. It would be a strange thing if the Court, after taking away the decree which was the foundation of his right, should still give him the costs which were incident to the decree. The Plaintiff having thought fit to present a petition of rehearing against the whole decree, the Defendants were entitled to raise every question (and among

among others the question of their costs) which properly arose out of the subject matter of the appeal; and I am bound to deal with the cause as if it now came before me upon the original hearing. Supposing that to be so, I should certainly, in dismissing the bill, give the Defendants their costs; and it is only upon those terms that the Plaintiff can be entitled to get rid of the decree which he has impeached by his present appeal.

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The result is, that the Defendants must have their costs of the suit, up to and inclusive of the hearing; but I cannot give them their costs of setting the decree right.

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In the Matter of JOHN ISAAC, a tenant *pur auter vie.*

*June* 15.

UNDER an order dated the 22nd of *April* 1837, certain costs, as taxed by the Master, were ordered to be paid to *Alice Isaac*, by *Emma Meyrick*. The affidavit of *Hugh Williams*, therein described as clerk to *H. R. Williams*, gentleman, stated, that on the 5th of *March* 1838, the deponent personally served *Emma Meyrick* with a true copy of the order of the 22nd of *April* 1837, and also with the Master's certificate of the amount of the costs, which had been taxed at 108*l.* 5*s.* 9*d.*, and that he at the same time personally demanded payment of that sum of *Emma Meyrick*, who then refused to pay the same or any part thereof, and had not since paid the same, either to the deponent, or to *Alice Isaac*, or to any person on her account.

An order to pay a sum of money to a particular person, by a day stated, is irregular, unless it is founded on a previous demand duly made, and a refusal to pay.

A demand made by a person not duly authorised to make it, amounts to nothing, although the party upon whom the demand is made does not, at the time, assign the want of the demandant's authority as a reason for refusing the demand.

Upon

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In the Matter of Isaac.

Upon a motion supported by this affidavit, the Vice-chancellor made an order, that *Emma Meyrick* should, within a week from the service of the order, pay to *Alice Isaac*, or her solicitors, the amount of her taxed costs as certified by the Master, together with the costs of the application.

Mr. *Wakefield* and Mr. *Girdlestone* now moved to discharge that order, which was, they submitted, improper. There was nothing to shew that payment of the costs had ever been duly demanded; for it did not appear, and indeed it was not pretended that *Hugh Williams*, described as the clerk of another person of the same name, who was not even stated to be *Alice Isaac*'s solicitor, had any express authority, much less a power of attorney, to receive and give a discharge for the payment; *Smith's Chancery Practice* (*a*), *Wilkins* v. *Stevens* (*b*), *Brandon* v. *Brandon.* (*c*) The order complained of was also irregular, because it was made at the cost of *Emma Meyrick*, who, if the taxed costs had not been duly demanded of her, had never been in any default.

Mr. *Richards*, *contrà*.

The passage cited from *Smith's Practice* obviously refers only to the case of a person who makes no appearance to resist the application. Here, *Emma Meyrick* appeared upon the motion before the Vice-chancellor and opposed it; but she never put her refusal to pay upon the ground that the party who served her had no authority to receive the money. *Brandon* v. *Brandon* and *Wilkins* v. *Stevens* have no application, for they were both cases of proceedings with respect to an attachment, where, therefore, personal liberty was concerned. As to the costs of the present order, there can be no appeal for costs only.

*The*

(*a*) Vol. i. p. 445. 2 ed.
(*b*) 19 *Ves.* 117.
(*c*) 1 *Bos. & Pul.* 394.

*The* LORD CHANCELLOR.

1838.

In the Matter of ISAAC.

The question here is, whether you had a right to the order fixing the time of payment, without first shewing that you had made a demand. I think it was incumbent on you to shew that you had duly demanded payment. Now a demand made by a person not armed with any authority to receive payment (and it is not shewn that *Williams* had any such authority), amounts to nothing. It was not necessary, I apprehend, for Mrs. *Meyrick* to assign any reason why she refused to pay; but the absence of that authority, though not stated by her, was the best reason in the world for her refusal. Unless, therefore, you can make out that the practice of the Court is, without any demand, to grant a short order fixing the time of payment, I think you have not brought yourself within the rule, and that the Vice-chancellor's order must be discharged, and the costs of the order repaid.

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## The Marquess of EXETER *v.* The Marchioness of EXETER and Others.

1837. *Dec.* 22.
1838. *Jan.* 31. *June* 22.

The Court being satisfied, upon the evidence, that a general description of property had been inserted inadvertently in a settlement, and not for the purpose of passing an estate, which the general description would in terms comprise, made a declaration that the general description had been inserted by mistake, so far as regarded the estate in question, and gave the parties liberty to apply as they might be advised.

UPON the treaty of marriage between the Plaintiff and the Defendant, the Marchioness of *Exeter*, then *Isabella Poyntz*, daughter of *W. S. Poyntz*, Esq., written proposals for a settlement were, by the Plaintiff's directions, drawn up by his solicitors, Messrs. *Foulkes*, *Langford*, and *Walford*, and by them submitted to the solicitors employed on behalf of Miss *Poyntz*, Messrs. *Forster*, *Frere*, and *Cook*, by whom, after some alterations, they were finally agreed to and adopted.

The

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The proposals stated that Lord *Exeter* would convey a portion of his estates, to be thereafter agreed on, to trustees, in the first place, for securing an annual sum of 350*l.*, for pin money for Miss *Poyntz*, during the joint lives of herself and Lord *Exeter*, and subject thereto, to the use of his Lordship for life; and after his decease, for securing a jointure of 4000*l.* a year to Miss *Poyntz*, if she survived him, to be reduced however to 3000*l.* a year in the event of her becoming entitled in possession to one third of her mother's estates; and, subject to this jointure, to trustees, in the usual manner, for raising sums, not exceeding 20,000*l.* in the whole, as portions for younger children; with remainders to the use of the first and other sons of the marriage, and their issue male, and on failure of such issue, to the use of Lord *Exeter*, his heirs and assigns.

A list of the names and rentals of the several estates intended to be comprised in the settlement, and the total rental of which was stated at the sum of 20,934*l.*, was subsequently laid before Messrs. *Forster*, *Frere*, and *Cook*, on behalf of Miss *Poyntz*, for their approbation; and, after some slight variations, was finally agreed to. In this list the estates were arranged alphabetically under the counties in which they were respectively situate: the only *Lincolnshire* estates specified in it were *Bourne*, *Bourne Fen Lands*, and *Morton*, of which the rentals were stated at 1528*l.* 12*s.*, 279*l.* 4*s.*, and 275*l.* 13*s.* respectively.

Shortly afterwards, an indenture of settlement was executed, dated the 8th of *May* 1824, by which the estates therein specified and described were conveyed by Lord *Exeter* to uses and upon trusts similar to those stated in the proposals. In the deed, after a particular enumeration and description, by their parcels and occupying tenants, of the several estates therein comprised, situate in the counties of *Northampton*, *Bedford*, *Buckingham*,

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*ingham*, and *Lincoln*, which estates corresponded exactly with those enumerated in the list before mentioned, came these words, — "and all other the manors, messuages, lands, tenements, hereditaments, and premises of the said Marquess of *Exeter*, within the said counties of *Northampton*, *Bedford*, *Buckingham*, and *Lincoln*."

The marriage of the Plaintiff and Miss *Poyntz* was solemnised a few days after the execution of the settlement, and there were issue of the marriage four children.

Besides, the *Lincolnshire* estates enumerated in the list, and specifically mentioned and described in the settlement, the Plaintiff, at the time when he executed it, was also seised in fee simple of another estate in the county of *Lincoln*, within the borough of *Stamford*, commonly called the *Stamford* estate, extending over several parishes within the borough of *Stamford*, and yielding a rental of nearly 5000*l.* a year.

Doubts having arisen, whether, by force of the general words before stated, the *Stamford* estate was not, by legal construction, comprised in the indenture, so as to pass by the conveyance and be subject to the uses of the settlement, the present bill was filed to have it declared that the estate in question was not intended to be so comprised, and ought to be released from the trusts thereof, and that the general words had been inserted by mistake; and to have the mistake rectified.

*Samuel Forster* (one of the partners in the house of *Forster*, *Frere*, and *Cook*) identified a paper writing, marked B, as being the list of the estates which were proposed and intended to be settled by the Plaintiff, and which were agreed to by all parties as the estates to be comprised in the settlement. He further deposed that it was his firm conviction and belief, that the Plaintiff did

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not intend that any other estate besides those enumerated in the list should be included in the parcels contained in the settlement; and that it was never proposed, either by or to him (the deponent) as the acting solicitor of the lady, that any other estates besides those named in the produced list should be settled by the Plaintiff on the occasion of his marriage: that no instructions were ever given by the Plaintiff to the deponent, or, to the best of his knowledge, to any other person, that the general words in question should be inserted in the settlement; and that he could only, therefore, account for their insertion by supposing that they had been introduced inadvertently, or merely for the purpose of including any of the lands specified in the list, which might possibly have been omitted in the description given of them in the parcels.

It appeared upon an inspection of the document marked B, that the estates specified in it were the same as those described in the settlement, exclusive of the general words which were used in the settlement, and, of course, exclusive of the *Stamford* estate.

It was proved, by the evidence of Mr. *Walford* the younger, a partner in the house of *Walford* and Sons, who were the successors in business of Messrs. *Foulkes*, *Langford*, and *Walford*, that he had found, tied up with the proposals and the other papers relating to the settlement, a list of the estates proposed to be settled, and that on comparing the parcels contained in the settlement, they fully and accurately described the parishes and townships within which the estates named in the list were situate, together with the names of the occupying tenants, and that they did not mention or include any other lands beyond those specified in such list, except by the general words. The same witness farther deposed that the *Stamford* estate was,

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was, in point of rental, double the value of any of the estates mentioned and enumerated in the settlement, and that the number of tenants upon it amounted to 380; that it was not in any manner comprised or included in the list; and that neither the estate nor any of the townships or parishes within which it was situate, nor any of the occupying tenants thereof, were mentioned by name in the settlement.

Sir *C. Wetherell* and Mr. *Jemmett*, in support of the bill, submitted first, that from the instruments on which the settlement was based, namely, the proposals and list, it was obvious that the *Stamford* estate was never meant to be included in it; secondly, that the evidence with respect to the object and intention of the parties was such as to be clearly admissible; and thirdly, that that evidence, if admitted, placed beyond a doubt the existence and nature of the mistake, which the Court, as it had the means, so it had also the jurisdiction to rectify. They referred to *Rogers* v. *Earl* (*a*), *Thomas* v. *Davis* (*b*), *Young* v. *Young* (*c*), *Alexander* v. *Crosbie* (*d*), *The Duke of Bedford* v. *The Marquess of Abercorn* (*e*), *Simpson* v. *Simpson* (*g*), Sir *Edward Sugden on Vendors and Purchasers* (*h*), as authorities for these propositions.

Mr. *Sidebottom*, for some of the parties, did not deny the jurisdiction of the Court; but he observed that the list which was proved in the cause, came out of the hands of the Marchioness's solicitor, and the evidence did not distinctly connect it either with the proposal, or with any thing in the way of contract between the parties.

Mr.

(*a*) 1 *Dick.* 294.
(*b*) 1 *Dick.* 301.
(*c*) Cited in 1 *Dick.* 295. and 303.
(*d*) 1 *Lloyd & Goold*, 145
(*e*) 1 *Mylne & Craig*, 312.
(*g*) V. C. *July* 1837, not reported.
(*h*) Vol. i. p. 161. 9th ed.

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Mr. *Barber* and Mr. *F. Walford* appeared for other parties.

The LORD CHANCELLOR, after remarking that there could be no question as to the jurisdiction, said that although he saw no difficulty in the case, he should look into the documentary evidence and the depositions before making a decree.

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1838. *June* 22.

*The* LORD CHANCELLOR.

I have looked through the pleadings in this cause, and the papers and the three exhibits, 1st, the proposal for a settlement, 2dly, the list or particular of the estates proposed to be settled, and 3dly, the settlement itself; and I am of opinion that the evidence (the two former documents being distinctly identified), brings the case within the principle upon which this Court exercises its jurisdiction of correcting mistakes in settlements.

It is, I think, clear that what is called the *Stamford* estate in *Lincolnshire*, no part of which is specified in the list, or described in the settlement, except under the words, "all other the manors, lands," &c. of Lord *Exeter* "within the counties of *Northampton*, *Bedford*, *Buckingham*, and *Lincoln*," was not intended to be included in the settlement; and that it formed no part of the proposal or of the contract, but was so included by mistake. I think, therefore, that the decree ought to declare that to be so, and direct a reconveyance of that estate.

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The decree, as drawn up, merely declared that the general words had been inserted by mistake, so far as regarded the *Stamford* estate, and gave the parties liberty to apply, as they might be advised.

1837.

## *Ex parte* PRIDEAUX, *In re* BUSH and PRIDEAUX.

1837.
*Aug.* 4.
1838.
*April* 26.

An articled clerk to an attorney and solicitor is not an apprentice within the meaning of the forty-ninth section of the Bankrupt Act, 6 *G.* 4. *c.* 16.

THIS was an appeal (by way of special case) from a decision of the Court of Review.

The bankrupts, *Bush* and *Prideaux*, were attorneys and solicitors, carrying on business in copartnership at *Bristol*. In the month of *October* 1834, *James Flower Fussell* became the articled clerk of *Bush*; and upon that occasion articles of agreement in the ordinary form were entered into between *Fussell* and his mother (as his natural guardian) of the one part, and *Bush* of the other part. By the articles, *Fussell*, in substance, bound himself faithfully and diligently to serve *Bush* as his clerk in the profession of an attorney and solicitor for five years then next ensuing, and for that period to attend regularly during the hours therein specified, at the office of *Bush* and his partner; and it was thereby further agreed that Mrs. *Fussell* should, during the term, provide her son with board and lodging and suitable apparel and other necessaries; and in consideration of the premises, and of 300*l.* paid to *Bush*, it was agreed that he, *Bush*, should take *Fussell* as his clerk for five years, and should, to the utmost of his skill, instruct him in the practice and profession of an attorney and solicitor, and, at the end of that time, use his best endeavours to procure him to be duly admitted in the courts of law and equity, provided that *Fussell* should have faithfully served his intended clerkship. There was also a proviso that in case *Bush* should die before the expiration of the term, a part of the premium should be repaid, proportioned to the period which should be then unexpired.

*Fussell*

1837.

*Ex parte* PRIDEAUX.

*Fussell* entered upon his service under the articles on the 4th of *October* 1834, and continued in such service until the 22d of *April* 1836, when a joint fiat was sued out against *Bush* and *Prideaux*, as scriveners, under which they were found bankrupts. During the whole of the intermediate period, *Fussell* was lodged and maintained by his mother.

The Court of Review, upon the petition of *Fussell* and his mother, made an order declaring that the commissioners should be at liberty to order to be paid to *Fussell*, or for his use, such sum as, having regard to the amount of the premium originally paid, and the period of the service already passed, they should think reasonable. (*a*)

The special case submitted that *Fussell* was not an apprentice within the true meaning of the 6 *G.* 4. *c.* 16. *s.* 49. (*b*), and that he was not entitled as such to any payment in respect of the fee of 300*l.*

Mr.

(*a*) 3 *Mont. & Ayrt.* 67., where the case is reported upon the hearing in the Court below.

(*b*) The two sections of the Bankrupt Act, upon which the argument of the case chiefly turned, are as follows; —

Sect. 48. "And be it enacted, that when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the commissioners, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding six months' wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove under the commission, for any sum exceeding such last-mentioned amount."

Sect. 49. "And be it enacted, that where any person shall be an apprentice to a bankrupt at the time of issuing of the commission against him, the issuing of such commission shall be and enure as a complete discharge of the indenture or indentures whereby such apprentice was bound to such bankrupt; and if any sum shall have been really and *bonâ fide* paid by or on the behalf of such apprentice to the bankrupt as an apprentice fee, it

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Mr. *Bethell*, in support of the appeal.

The sole question here is upon the construction of the forty-ninth section of the Bankrupt Act. The Judges in the Court below, anxious to relieve the party, in a case which seemed hard, and overlooking the hardship which would thereby be occasioned to the general body of creditors, whose rights were of course proportionably prejudiced, decided, by a majority of their number (but against the opinion of the Chief Judge), that an articled clerk came within the scope and meaning of the section, and that *Fussell* was therefore entitled to have a portion of the premium repaid. There is no warrant, however, in the language of the section, or the general purview of the act, for any such construction. The articled clerk of an attorney or solicitor is not within the mischief intended to be provided against, because his employer, not being within the operation of the bankrupt laws, cannot, at least in his professional character, be the subject of a fiat or commission. It has never hitherto been supposed, far less decided, that an articled clerk, though certainly in a sense he may be called an apprentice, inasmuch as one object of his being so articled is that he may be instructed in the profession of the law, is, either in common parlance or legal language, an apprentice. In the popular, no less than the legislative meaning of the word, an apprentice is one who is bound by indentures to serve for a term of years with a person carrying on some trade or handicraft employment,

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it shall be lawful for the commissioners, upon proof thereof, to order any sum to be paid to or for the use of such apprentice which they shall think reasonable; regard being had in estimating such sum to the amount of the sum so paid by or on behalf of such apprentice to the bankrupt, and to the time during which such apprentice shall have resided with the bankrupt previous to the issuing of the commission."

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ployment, and who, in consideration of the services which he renders, is to be taught the business, and to reside under the roof of his master. That living in the house of the master is a necessary ingredient in the character of apprenticeship, is clear from the language of the forty-ninth section of the Bankrupt Act, which says, that in estimating the sum to be repaid, regard shall be had to the time during which the apprentice shall have *resided* with the bankrupt. The provisions of that section were obviously intended to apply only to trade apprentices, and not to persons placed with members of a liberal profession, for the purpose of receiving a professional education. The connection between a solicitor and his articled clerk is of a totally different nature from that which subsists between a tradesman and his apprentice. The articled clerk does not usually board or lodge in the solicitor's house, and, except during office hours, he is not subject to his authority or control. The business of the solicitor is not necessarily suspended or destroyed by his becoming a bankrupt, and the services of the articled clerk may, notwithstanding, continue to be available to his employer, and useful and instructive to himself.

Mr. *Swanston* and Mr. *Bacon*, *contrà*.

Before the passing of the late Bankrupt Act, the articled clerk of an attorney was, in practice, always considered as an apprentice; *Newton* v. *Rowse* (*a*); and so, in fact, he is, for he is bound to his master by articles (which are in equity tantamount to indentures), for the express purpose of learning the business of an attorney. The forty-ninth section was only introduced into the Bankrupt Act for the purpose of giving a legislative sanction to a practice which this Court, sitting in bankruptcy, in the exercise

(*a*) 1 *Vern.* 460.

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exercise of its equitable jurisdiction, had established long before; *Ex parte Sandby* (*a*), *Barwell* v. *Ward.* (*b*) And the object of the legislature in enacting it, was to relieve apprentices of every description from the degrading situation in which they would feel themselves placed by the bankruptcy of their masters. Articled clerks are as much within the mischief as any other species of apprentices; for what can be more injurious and degrading to a young man than to be obliged to remain, until the expiration of his articles, in the service of a person whose business, in consequence of his bankruptcy, must of necessity be greatly diminished, or, more probably, ruined? That the employer was not, *quâ* attorney, liable to the bankrupt laws, makes the case of the articled clerk only the more cruel, for in proportion as the event is discreditable to his master, it is likely to be injurious to himself. The distinction suggested between trade apprentices and apprentices of other kinds is untenable. Youths who are bound to engravers, ship-captains, surgeons, and other classes of persons who are not subject to the operation of the bankrupt laws, are still in the strictest sense of the term apprentices, and many of such apprentices do not reside in the houses of their employers. The case of the articled clerk of an attorney being clearly within the mischief, and not being provided for by the forty-eighth section, it falls, by a necessary implication, within the forty-ninth, upon which the Court has always been in the habit of putting a liberal construction; *Ex parte Haynes* (*c*), *Ex parte Gough.* (*d*)

Mr. *Bethell*, in reply, observed that none of the authorities referred to applied to the case of an articled clerk to an attorney, with the exception of *Newton* v. *Rowse*

(*a*) 1 *Atk.* 149.
(*b*) 1 *Atk.* 260.
(*c*) 2 *Gl. & J.* 122.
(*d*) 3 *Deac. & Ch.* 189.

1837. *Ex parte* PRIDEAUX. *Rowse*, which turned upon the construction of the contract, and had nothing to do with bankruptcy. If the respondent was anxious to be relieved, as he professed, from the disparaging connection, he might apply for an order to the Court of King's Bench, which had authority to discharge him from his articles by virtue of its general jurisdiction over attorneys.

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1838. *April* 26.

*The* LORD CHANCELLOR.

The question raised upon this special case is, whether the clerk of an attorney, that attorney becoming bankrupt in consequence of some other business in which he was engaged, is entitled to the benefit of the forty-ninth section of 6 *G.* 4. *c.* 16. By the preceding clause it is enacted, that where any bankrupt, &c. [His Lordship, having read the forty-eighth and forty-ninth sections of the act, proceeded.] Now these two clauses come immediately in connection with each other. The one speaks of clerks, and the other of apprentices, and the question is, whether an articled clerk of an attorney is an apprentice within the meaning of the forty-ninth section.

In one sense, undoubtedly, it may be said that a clerk is an apprentice to the attorney with whom he is placed; he is placed with him partly for the purpose of qualifying him to be admitted as an attorney under the act of parliament, and partly to learn the business of an attorney; and in that sense he may be said to be an apprentice. The meaning of the term apprenticeship, abstractedly from the meaning which it has in practice received, is a service, the consideration for which is, in fact, the being taught the business of the party with whom the apprentice is placed. But, in the construing of this act of parliament, as in the construction of other acts, the

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the question is not, whether, in the abstract, and according to the original derivation of the word, it may not be susceptible of some other meaning, but what is the ordinary acceptation of the term, and whether the legislature has put any definite meaning upon it; because, if that be the case, — if the legislature has in this act used the word in its ordinary sense, or above all in the sense in which it had been used in previous acts of parliament, that sense must prevail.

The term "apprentice" is to be found in the stat. 5 *Eliz. c.* 4. Whether there be any earlier statute in which the term occurs is not very material, because it is very clear from that statute, what at that time was the meaning of the word "apprentice." In the twenty-fifth section of that statute, it is enacted that, "for the better advancement of husbandry and tillage, and to the intent that such as are fit to be made apprentices to husbandry may be bounden thereunto," "every person being an householder, and having and using half a plough-land at the least in tillage, may have and receive, as an apprentice, any person above the age of ten years, and under the age of eighteen years, to serve in husbandry until the age of one and twenty years at the least, or until the age of twenty-four years, as the parties can agree; and the said retainer and taking of an apprentice to be made and done by indenture."

The statute then goes on to provide, in the next section, that every person being an householder, and twenty-four years old, dwelling in any city or town corporate, and using and exercising any art, mystery, or manual occupation there, shall and may, during the time that he shall so dwell and use and exercise any such mystery, art, or manual occupation, have and retain the son of any freeman, not occupying husbandry, nor being

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a labourer, and inhabiting in the same, or any other corporate town, to serve and be bound as an apprentice for seven years at the least.

The twenty-seventh section enacts, "That it shall not be lawful to any person dwelling in any city or town corporate, using or exercising any of the mysteries or crafts of a merchant, trafficking by traffic or trade into any the parts beyond the sea, mercer, draper, goldsmith, ironmonger, embroiderer, or clothier that doth or shall put cloth to making and sale, to take any apprentice or servant to be instructed or taught in any of the arts, occupations, crafts, or mysteries, which they or any of them do use or exercise, except such servant or apprentice shall be his son, or else that the father and mother of such apprentice or servant shall have, at the time of taking such apprentice or servant, lands, tenements, or other hereditaments, of the clear yearly value of 40*s.*, of one estate of inheritance or freehold at the least."

Here, certain descriptions of trades are subjected to certain regulations as to taking apprentices. The only two descriptions of apprentices contemplated by that act, are apprentices to husbandry, and apprentices to certain trades which were subject to the operation of the bankrupt laws.

The first act which takes notice of clerks articled to attorneys, is the 2 *G.* 2. *c.* 23., by the fifth section of which it is enacted, "That from and after the 1st day of *December* 1730, no person who shall not before the said 1st day of *December* have been sworn, admitted, and inrolled pursuant to the directions of this act, shall be permitted to act as an attorney, or to sue out any writ or process, or to commence, carry on, or defend any action or actions, or any proceedings, either before

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or after judgment obtained, in the name or names of any other person or persons, in any of the courts of law aforesaid, unless such person shall have been bound by contract in writing to serve as a clerk, for and during the space of five years, to an attorney duly and legally sworn and admitted, as hereinbefore is directed, in some or one of the courts hereinbefore mentioned; and that such person, for and during the said term of five years, shall have continued in such service; and also, unless such person, after the expiration of the said term of five years, shall be examined, sworn, admitted, and inrolled, in the same manner as the persons who shall be admitted attorneys of the said Courts, are hereinbefore required to be examined, sworn, admitted, and inrolled."

The word apprentice is not here used; nor is there any reference to the term in the section. The clause is only a provision that, before a person shall be admitted as an attorney, he shall have been bound by contract in writing, to serve as a clerk to an attorney for a certain time, and shall have during that time continued in such service.

In several subsequent statutes, these two subject-matters are referred to. There are various statutes as to apprentices, and various statutes as to articled clerks; some for the purpose of regulation, others for the purpose of imposing stamp duties on the instruments by which the party is apprenticed or articled. Now, as far as appears from the statutes referred to in the arguments, and as far as I can see, the statutes invariably keep the two things totally distinct: clerks are never called apprentices; and the distinction between them is kept up, not only in the terms by which they are designated, but also in the regulations prescribed with respect to them, and in the stamp duties payable by them.

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I observe that the Chief Judge in the Court of Review referred to an *Irish* statute (*a*), in which the term "apprentices" is used as applicable to the articled clerks of attorneys; but that statute so mentions or refers to them, not for the purpose of uniting them with other descriptions of apprentices, but for the purpose of keeping up the distinction. That statute, however, does not apply in *England.*

Such being the result of investigation into the former acts, it is impossible to say that the legislature intended to deal with clerks, as well as with the persons who in former statutes had been designated apprentices. The term "apprentices" in this statute must, according to every rule of construction, have reference to that legislative meaning which prior acts have attached to that particular word.

I need only add, therefore, that I agree with the Chief Judge, — I can hardly say, *against* the two other Judges, for Sir *George Rose* was, at first, of the same opinion as the Chief Judge.

The use of the word "clerk" in the clause immediately preceding, and not in the forty-ninth clause, makes the case still stronger; and it is most reasonable to suppose that, if the legislature had intended that the forty-ninth clause should apply to articled clerks, it would have distinctly made a provision to that effect. But it is not at all probable that the legislature should have made provision in that section for a clerk to an attorney; because it was dealing with those who, in the ordinary course of proceedings, would be affected; that is, with persons in trade, whom bankruptcy deprives of the

(*a*) *55 G. 3. c. 78.*

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the ordinary means of carrying on their trade, and with individuals who, being apprenticed to a person of that description, are left without the means of learning from him the trade which he had undertaken to teach them. The section provides, first of all, for the breaking off of the connection, and then for the return of part of the consideration which had been paid upon the footing of the continuance of that connection.

No such circumstances, however, are found in the case of a clerk articled to an attorney. The bankruptcy of the latter does not interfere with the contract, because he does not become bankrupt as attorney. He may, indeed, occasionally be engaged in other transactions, in respect of which he becomes a bankrupt. It is not natural, however, to suppose that the legislature intended to provide for such a case as that: it is more natural to suppose that the legislature did not intend to provide for it. An attorney's becoming bankrupt may, possibly, though not necessarily, deprive his articled clerk of the means of learning his profession from him: it does not follow that he will lose all his business as an attorney, and that he will not still be able to give his articled clerk the benefit of learning his profession.

If I could find the means, upon a fair construction of this statute, of relieving this gentleman, under the circumstances in which he is placed, I should be very glad to do so; but I do not think that such a course would be at all warranted, either by the terms of this statute, or by the meaning applied to this word in former statutes.

There can be no costs of this proceeding; nor do I think that there should be any costs of the proceeding in the Court below.

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The Court will grant a perpetual injunction against the use, by one tradesman, of the trade marks of another, although such marks have been so used in ignorance of their being any person's property, and under the belief that they were merely technical terms.

As a general rule, the costs of the cause should follow the result of the cause; but an exception will be made where a party has established his object by means of an unnecessary degree of litigation.

THE bill, which was filed on the 7th of *August* 1834, stated that the Plaintiffs, *Crowley Millington* and *Thomas Isaac Millington*, carried on, and had for many years carried on, the business of manufacturing steel for sale, at *Swalwell*, *Winlaton Mill*, and *Team*, all in the county of *Durham*, near *Newcastle*, and at *Greenwich*, in *Kent*, and in *Thames Street*, *London*; and that the Plaintiffs' works at *Swalwell* were known as "The *Crowley* Works:" that the business carried on by the Plaintiffs was originally founded at the end of the seventeenth century, or in the early part of the eighteenth century, by a person of the name of *Crowley*, who invented or introduced a particular mode of manufacturing steel, which has ever since been followed by the Plaintiffs and those whom they succeeded in business: that some descriptions of steel so manufactured were known as *Crowley's German*, or shear steel, and the same and other descriptions, by the name of *Crowley* steel: that about the year 1782, the Plaintiffs' grandfather, *Isaiah Millington*, became a partner in the business, and that it has ever since been carried on by him or his descendants, either alone or with partners; and that, from the time at which he

Thus, the Plaintiffs having filed a bill to restrain the Defendants from using certain trade marks, and for an account of the profits made by the sale of goods so marked, obtained an *ex parte* injunction. On the same day, the Plaintiffs received a letter from the Defendants' solicitor, in which the Defendants stated (through their solicitor) that they had never used the marks since they were aware they were private property; and that they did not intend to use them again; and they offered to compensate the Plaintiffs for any injury they might have sustained. The Plaintiffs, however, prosecuted the cause to a hearing; and then, by their counsel, abandoned their title to the account, because it was so small as not to be worth taking. The Lord Chancellor, although he made the injunction perpetual, refused the Plaintiffs the costs of the suit.

he entered the business, the firm has been known by the name of *Crowley, Millington*, and Co., and the steel manufactured by them has been known in the market by the name of *Crowley* steel, or *Crowley Millington* steel: that the steel manufactured by the Plaintiffs and their predecessors has always been distinguished by certain marks upon the bars or pieces of steel so manufactured: that the principal of these marks was originally "*Crowley*," and afterwards "*Crowley Millington*," or one of those names; and that such marks have been stamped on shear steel, faggot steel, cast steel, blistered steel, and coach-spring steel: that the letters "*I. H.*" were, upwards of fifty years ago, introduced into the marks stamped on double shear steel made by the Plaintiffs' firm, being the initials of the name of *John Heppel*, their principal workman in that steel.

The bill went on to state that the Defendants, *James Fox* and *Samuel Fox*, had, for more than six years before the filing of the bill, carried on, at *Sheffield*, the business of manufacturers of steel, under the name of "*Fox* Brothers," or "*Fox*, Brothers, and Co.;" and that they had manufactured considerable quantities of steel, which they had marked with the Plaintiffs' before-mentioned marks; and that they had so marked steel manufactured by them, in order that it might be sold in the market as steel manufactured by the Plaintiffs; and further, that other persons besides the Defendants had marked steel with the Plaintiffs' marks; and that the Defendants had bought the steel so marked and sold it again. The bill charged that the Defendants were still in the habit of selling, or sending for exportation, great quantities of steel stamped with the Plaintiffs' marks.

The prayer of the bill was, that the Defendants might account to the Plaintiffs for the profits made by them by

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by the sale of steel stamped with the Plaintiffs' before-mentioned names or marks, and might deliver up to be destroyed all steel not manufactured by the Plaintiffs, but stamped with their names or marks, and all instruments used or intended to be used in making such marks; and that the Defendants might be restrained by injunction from stamping steel with the before-mentioned names or marks, and from manufacturing or selling steel so stamped.

The answer of *Samuel Fox* stated that in *June* 1834, before the bill was filed, *James Fox* went to *America*, and had not since returned; and that about four or five months before the date of his (the present Defendant's) answer, he was, for the first time, informed that the Plaintiffs carried on the business of manufacturing steel under the firm of "*Crowley, Millington*, and Co.," such information having been obtained by the Defendant by means of an advertisement in the *Sheffield* newspapers, stating that an injunction had been obtained by *Crowley, Millington*, and Co. against Messrs. *Greaves*, to restrain the use of the names or words "*Crowley Millington*" on steel manufactured by Messrs. *Greaves*; and that ever since the Defendant had known any thing of the manufacture of steel, the term "*Crowley*" had been applied to steel manufactured from the bar, and made up in bundles of one hundred weight each, called faggots; the term "*Crowley*" having been, for twenty years and upwards, and so long as the Defendant had known the steel trade, been considered synonymous with the term "faggot," and not as designating the manufacture of any particular persons; and that one of the oldest mark makers in the steel trade had been for forty years and upwards in the habit of making marks with the word "*Crowley*" for various houses engaged in the manufacture of steel; and that until the advertisement appeared, the

the Defendant was not aware that the terms "*Crowley*" and "*Crowley Millington*" were any other than marks designating particular kinds of steel, such marks having been used generally, if not universally, in the steel trade, for very many years: that by the term "*Crowley*" steel, the Defendant always understood tilted, rolled, or single shear, or sheared steel, made up in a bundle of one hundred weight, and manufactured from a bar of steel; and by the term "*Crowley Millington*" steel, shear or sheared steel, made up in bundles of one hundred weight and manufactured from several bars; and that no marks were requisite more particularly to designate them; the mark "*Crowley*" never, to the Defendant's knowledge or belief, being used upon any kind of steel, but that made from a single bar or two bars, and put up in bundles of one hundred weight each; and the names "*Crowley Millington*," never, to the Defendant's knowledge or belief, being used by any persons in the steel trade upon any steel but such as had been sheared; that is to say, made from a number of bars, and then made up in bundles of one hundred weight each: and that the marks or names were in no one instance supposed to designate a maker's name, but merely the quality or kind of article: that the Defendant never knew or believed, or was informed, that the letters "*I. H.*" had any other signification than as being one of the ordinary marks used among steel manufacturers throughout the kingdom for a long course of years; and that he never knew or heard of such a person as *John Heppel*.

The Defendant also stated, that he believed he had never used the marks mentioned in the bill, without the words "*Fox* Brothers" also, and denied that steel so marked as in the bill mentioned, was, by reason of such marks, considered in the market to be manufactured by the Plaintiffs' firm; and that until about the month of *July*

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*July* 1834, he never even heard that there was any such firm in the trade as *Crowley, Millington*, and Co.:

That, in or about the year 1831, the Defendant and his brother became partners, as merchants in the steel trade, and from that time until in or about the year 1832, had a steel converting furnace; but since that period had not manufactured any steel; and that their firm had manufactured some small and very inconsiderable quantity of steel, and bars of steel, marked (amongst other marks) with the marks or stamps mentioned in the bill to be used by the Plaintiffs, but with the words "*Fox* Brothers" always added; and also some small and inconsiderable quantity of steel and bars of steel stamped with some material parts of those marks, together with the words "*Fox* Brothers;" and that, particularly, they had also manufactured a small and very inconsiderable quantity of steel and bars of steel stamped with the marks "*Crowley Millington*," and the letters "*I. H.*" He denied that he or his partner had so marked steel manufactured by them in order that it might be sold in the market as steel manufactured by the Plaintiffs; the Defendant having, during the whole time that any steel with those marks was manufactured or sold by his firm, been wholly ignorant of the existence of the Plaintiffs, or of their firm, as manufacturers of steel, and always adding other marks, besides those mentioned in the bill; and also the words "*Fox* Brothers:" that the Defendants did not sell any such steel in the *English* market, as their business lay entirely with *North America*, whither they exported steel: that he had been informed and believed, that the marks in question were in general use in *Sheffield* and its neighbourhood, until the injunction was obtained against Messrs. *Greaves;* and that, since hearing of the injunction obtained against Messrs. *Greaves* and Co., the Defendant

and his partner had entirely abstained from selling any steel marked with the marks in question, or any of them:

That the Plaintiffs having, by some means unknown to the Defendant, obtained the before-mentioned injunction against Messrs. *Greaves*, the Defendant, not then knowing the grounds on which the same had been granted, or on which the claim put forth by the bill was founded, and being alarmed at the prospect of the vexation, harassment, and expense of a chancery suit, caused his solicitor, on or about the 2d of *August* 1834, and some time before the bill was filed, to write and send to the Plaintiffs the following letter:

"*Sheffield, August* 2, 1834.

"Gentlemen. — Messrs. *Fox* Brothers of this place, merchants, and who are clients of mine, and who some time ago carried on the steel trade, but who have now entirely discontinued it, have been informed that an intention exists on your part of taking proceedings against them for the use of marks claimed by you as yours only, namely, the words "*Crowley*" and "*Millington.*" Until they were apprised, by the advertisement announcing the injunction obtained against Messrs. *Greaves*, they had not the most distant idea that those marks were the property of any individual, but merely a distinguishing mark, used as the word "*German,*" or any other kind of steel. Under this impression I admit (without prejudice to my clients) that they had used the mark on a very small quantity of steel sold by them since they commenced business, namely, since 1831. The moment they were aware that they might be considered as infringing an individual's mark, they ceased to use it, and have never since done so, nor ever intend to do so; indeed, as before stated, they have given up the steel trade.

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To represent these facts I called upon Mr. *Milner*, who I understood had been employed professionally by you, and should have done then, what, in consequence of his absence, I do now, offer to show to Mr. *Milner* or any other party you may wish, the amount of all steel sold by them having marks calculated to injure you, and to submit either to the decision of any indifferent party, what remuneration ought to be allowed to you for their having thus, through ignorance, done that which was calculated to injure you, or otherwise to try to settle the matter with yourselves, or with Mr. *Milner* on your behalves. This offer is made from the desire which my clients have to liquidate any loss which they may have occasioned, however innocently it has been done on their part; and I trust the spirit in which it is made will be correspondingly met. I beg to observe, that it is in consequence of your solicitor's (Mr. *Milner*'s) absence from home that I address you without first communicating with him: I feared delay might be injurious; but I will see Mr. *Milner* on his return, and communicate what I have done. I am, gentlemen, your obedient servant, *Luke Palfreyman*. Messrs. *Millington*, *Crowley*, and Company, *Newcastle*."

After this answer had been put in, the Plaintiffs amended their bill, by stating that the business which the Defendants had carried on at *Sheffield*, for more than six years past, was that of merchants and dealers in steel; and that they formerly, and until about three years ago, carried on, under the same firm, the business of manufacturers of steel, which, however, they had since given up. The amended bill contained a variety of charges, framed for the purpose of meeting the statements contained in *Samuel Fox*'s answer; and, amongst other things, it alleged that the Plaintiffs' marks had been fraudulently used by the Defendants on steel manufactured

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factured *or sold* by them, and charged that the Defendants *were* [not *are*] in the habit of polishing steel, and afterwards causing the names "*Crowley, Millington,*" or one of them, to be stamped thereon; and that part of the steel marked with the names "*Crowley, Millington,*" or one of them, which had been sold by the Defendants, was of inferior quality; by which means they injured the repute of the Plaintiffs' manufacture.

*James Fox* having afterwards returned from *America*, the two Defendants put in a joint and several answer to the amended bill, in which the Defendant *James Fox* stated that he went to *America* in or about *July* 1834; and that he had lately returned; and that, since his return, he had been, for the first time, informed, and for the first time believed, that the Plaintiffs carry on the business of manufacturing steel for sale, under the firm of "*Crowley, Millington,* and Co.," or that there was any such firm in the trade as "*Crowley, Millington,* and Co." By this answer the two Defendants admitted that they now carried on, and that they had for the period in that behalf in the bill mentioned carried on at *Sheffield*, the business of merchants and dealers in steel and files, under the firm of "*Fox* Brothers;" and that they formerly, and until about three years before the date of the present answer, also carried on, under the same firm, the business of manufacturers of steel; and that they had since given up such business; and that they had not themselves at any time since *May* 1832, been manufacturers of steel, but since that time had had, and still had, their iron converted into steel, and tilted, sheared, rolled, and finished by other manufacturers for hire; and, therefore, were now (except as before-mentioned) merely merchants and dealers in steel. The Defendants denied that any steel sold by them, and marked with the names, "*Crowley, Millington,*" or either

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of them, was of inferior quality, or injured the repute of the Plaintiffs' manufacture. The Defendant, *James Fox*, supported, in precisely similar terms, all the before-mentioned statements contained in the separate answer of *Samuel Fox*.

It appeared, from the second schedule annexed to these answers, that the profits, made by the Defendants, upon steel sold by them, and bearing the marks in question, or one of them, amounted to 6*l.* 10*s.* 11*d.*; and that the Defendants had sold certain steel, which was ordered under the name of "*Crowley*," or "*Crowley Millington*," but was not marked with either of such names; and that the profits upon such last-mentioned steel amounted to 6*l.* 11*s.* 5½*d.* It appeared also from the same schedule, that the last order for the steel which had been so marked, was dated from *Quebec*, on the 19th of *June* 1833; and that the last order for the steel which had been ordered by the before mentioned names, but had not been marked with them, was dated from *Quebec*, in *December* 1833.

The pleadings were long; and numerous witnesses were examined on both sides.

Evidence was given to shew that the Plaintiffs had carried on business, as manufacturers of steel, under the name of "*Crowley, Millington*, and Co.," for many years; and that they used the marks mentioned in the bill; and that the firm of "*Crowley, Millington*, and Co.," had been known in the steel trade, for fifty years and upwards, as manufacturers of steel.

One of the Plaintiffs' witnesses, however, stated, that many years before he heard of the proceedings against *Greaves* and Son, he had heard of other manufacturers stamping

stamping the marks "*Crowley, Millington*," and "*Crowley*" upon steel not manufactured by the Plaintiffs' firm.

*William Pashley Milner*, of *Sheffield*, attorney-at-law, stated, in evidence, that on the 28th of *July* 1834, he made an application to the Defendant, *Samuel Fox*, to know whether his firm had stamped or marked the names, "*Crowley, Millington*," or either of them, upon any kinds of steel manufactured by them; and that *Samuel Fox* would make no direct admission that his firm had used the Plaintiffs' marks, but said that he would not interfere; and that the Plaintiffs might file a bill against them if they pleased. It appeared, by this witness's evidence, that, a few days after the filing of the bill in this cause, another steel manufacturer had admitted to him that he had used the Plaintiffs' marks, but begged that no proceedings might be taken against him; and that another manufacturer had, on the 30th of *July* 1834, admitted to him, that although his firm had not used the Plaintiffs' marks, they had ordered some of the Plaintiffs' marks of a mark-maker.

One of the Defendants' witnesses stated, that he had, thirty years before, worked, for four years and upwards, for the Plaintiffs' predecessors, at *Winlaton Mill*, and had known the names or marks "*Crowley*," "*Crowley, Millington*," and "*I. H.*" as used on steel for thirty-eight years past; and that such marks were used on steel, manufactured by the Plaintiffs' predecessors, when he was in their service; and that he believed that the Plaintiffs' were, in the year 1816, aware that those marks were used by other persons in the trade, and were in general use amongst persons in *Sheffield*; and that the reason for such his belief was, that he did, in that year, inform Mr. *John Smith*, of *Shoreditch, London*, the agent there of the Plaintiffs', or their predecessors, that their

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marks were used by persons engaged in the manufacture of steel in *Yorkshire;* and that Mr. *Smith* replied, —"If we had known that, we should follow the law upon them, and prosecute them:" and that a further reason for such his belief was, that, upwards of fourteen years ago, the fact of such marks being so used by other persons in *Sheffield*, was often the subject of conversation amongst the workmen in the shear-steel trade in *Sheffield*. Several witnesses proved that the words, "*Fox* Brothers," were always marked on the steel manufactured by or for the Defendants, and that none of the marks, "*Crowley*," "*Crowley, Millington*," and "*I. H.*," was ever put on without the words "*Fox* Brothers." Another witness deposed, that the marks "*Crowley*" and "*I. H.*," were known as denoting, not the makers, but the kind of steel; and that those marks had been publicly and generally used by the manufacturers of steel in various parts of *England* and *Wales*. Another witness deposed to the same effect, with reference to the marks "*Crowley, Millington*," as well as "*Crowley*," and "*I. H.*" A mark-maker of *Sheffield*, deposed to having, for thirty years last, and upwards, openly made marks or stamps for marking the words or letters, "*Crowley*," "*Crowley, Millington*," and "*I. H.*" It was proved that the marks were imposed, not secretly or at the Defendant's warehouse, but at the forge where the steel was sheared. Another witness stated, that he believed that the Plaintiffs were, eighteen years before the year 1834, informed of aware that the mark, "*Crowley, Millington*, and Co.," was used by persons in the steel trade or manufacture at *Sheffield*, or in general use there, the witness having, in the year 1816, at the Plaintiffs' works at *Swalwell*, informed three persons who were then all in the employ of the Plaintiffs, as managers or agents, to that effect when one of them replied, he believed it was done; and the witness added that in the year 1824, he again informed

formed one of the same three persons to the same effect; when he replied, that he knew the Plaintiffs' mark was forged in *Sheffield;* but that the purchasers knew that the mark was forged, and it did not do them any injury. Another witness stated, that the use of the three marks before mentioned, by Messrs. *Greaves* and Sons, of the Sheaf-Works at *Sheffield*, was notorious, for the last ten years, among persons engaged in the steel trade.

A manufacturer of steel, who had been such for eleven years, deposed, that at the time at which he commenced business in the steel trade, several of the old established houses in that trade in *Sheffield* and the neighbourhood, were in the habit of inserting, "*Crowley*, or Faggot Steel," in their lists of prices which they circulated amongst their customers; and that, before the year 1834, at which time legal proceedings were taken by the Plaintiffs against Messrs. *Greaves* and Sons, respecting the use by them of the name, "*Crowley*," that name did not denote, and was not known in the market as denoting the name of the person by whom it was impressed, but the particular kind of steel called faggot steel; and that the name, "*Crowley*," was publicly and generally used by manufacturers of steel. These statements were corroborated by other witnesses.

A witness named *Marshall*, who had been a steel manufacturer for forty years up to the year 1830, deposed that the names "*Crowley*," and "*Crowley, Millington*," were in general use in the steel trade, and amongst the manufacturers of steel, for thirty years previously to the year 1830, and that they were not used to denote the makers' names, but the description of steel. This witness, upon cross-examination by the Plaintiffs, stated that he had, when in the steel trade, manufactured steel

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at *Sheffield*, which he had marked "*Marshall's Crowley*," and "*Marshall's Crowley Millington.*" Another of the Defendants' witnesses, formerly a merchant, deposed, upon cross-examination by the Plaintiffs, that he had sold steel, marked "*Marshall's Crowley*, best, No. 3.;" "*Marshall's* best *Crowley Millington*;" "*Marshall's Crowley*;" "*Marshall's Crowley Millington*, No. 3.;" "*Naylor* and *Sanderson's* warranted *Crowley* steel;" "*Drabble's Crowley*, No. 3., best;" "*Marshall's Crowley*, best" (with the mark of a pair of shears).

On the 9th of *August* 1834, two days after the filing of the bill, the Plaintiffs obtained an injunction against the use of the marks in question by the Defendants. This injunction was obtained *ex parte*, upon the affidavits of one of the Plaintiffs and of Mr. *Milner*, and the Defendants never attempted to dissolve it.

The cause now came on to be heard.

Mr. *Wigram* and Mr. *James Russell* argued the case for the Plaintiffs.

*The Solicitor-General* and Mr. *Stuart*, on behalf of the Defendants, contended (amongst other things) that the Plaintiffs were not entitled to the relief they asked, inasmuch as it had not been proved that the Defendants had made use of the Plaintiffs' marks knowingly and wilfully; and that as there was no evidence that the Defendants intended to continue the use of those marks, the Plaintiffs had no right to prosecute this suit to a hearing, for the purpose of making the injunction perpetual; and that, as the Plaintiffs were not now entitled to a perpetual injunction, they were not entitled to the account; *Baily* v. *Taylor* (*a*); and that, even if there were

(*a*) 1 *Russ. & Mylne*, 73.

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were not that objection to their title to the account, yet the sum to which they would be entitled, on taking the account, was so small, that the Court would consider it an abuse of its jurisdiction to bring the cause to a hearing for such a paltry sum, and would dismiss the bill with costs; *Whittingham* v. *Wooler*. (*b*) They also stated, that the Defendants could have had no object in moving to dissolve the injunction.

Mr. *Wigram*, in the course of his reply, upon being asked by the Lord Chancellor, whether he persisted in asking for the account, said, that he did not think it worth while to do so.

*The* LORD CHANCELLOR expressed an opinion that the Plaintiffs had made out a case which entitled them to an injunction, but said that he doubted whether they were entitled to costs as against the Defendants, and should wish to hear the Plaintiffs' counsel further on that point, and to look into the pleadings.

Mr. *Wigram* then contended, that the Plaintiffs were entitled to the costs of the suit; and stated, that the letter of the 2d of *August* 1835, was directed to the Plaintiffs' works near *Newcastle*; and that, the Plaintiffs being then in *London*, the letter did not reach them in *London* until the 9th of *August*, the day on which the injunction was obtained.

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*The* LORD CHANCELLOR.

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The sole object I had in looking into the pleadings in this cause was, to satisfy myself as to what ought to be done

(*a*) 2 *Swanst.* 428.

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done with respect to the question of costs; having previously come to the conclusion that there was sufficient in the case to shew that the Plaintiffs had a title to the marks in question; and they undoubtedly had a right to the assistance of a court of equity to enforce that title. At the same time, the case is very different from the cases of this kind which usually occur, where there has been a fraudulent use, by one person, of the trade marks or names used by another trader.

I see no reason to believe that there has, in this case, been a fraudulent use of the Plaintiffs' marks. It is positively denied by the answer; and there is no evidence to shew that the Defendants were even aware of the existence of the Plaintiffs, as a company manufacturing steel; for although there is no evidence to shew that the terms "*Crowley*," and "*Crowley Millington*," were merely technical terms, yet there is sufficient to shew that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the Plaintiffs of their right to the exclusive use of those names; and therefore I stated, that the case is so made out as to entitle the Plaintiffs to have the injunction made perpetual.

With regard to the other part of the case, namely the account, it is of so infinitely minute importance that the Plaintiffs have (very discreetly, in my opinion,) abandoned it.

The question remains, What is to be done as to the costs? Now, the question of costs in Chancery is left to the discretion of the Court. That discretion ought to be

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be exercised, as far as possible, according to some principle; and I am very much disposed, as a general rule, to make the costs follow the result; because, however doubtful the title may be, or however proper it may be to dispute it, it is but fair that the party who really has the right should be reimbursed, as far as giving him the costs of the suit can reimburse him. But then there is another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights. I find no fault with the filing the bill, provided the parties had not then had the letter of the 2d of *August*, which has been referred to; for it appears that there was, on the 28th of *July*, an application by the Plaintiffs, which was met by the Defendants in a manner which justified the Plaintiffs in filing the bill. If that circumstance had been stated in the bill, it might have given the Defendants some means of explaining it; but, at all events, it is in evidence. On the 2d of *August*, however, the Defendants took a very different view of the case, and, on that day, they wrote a letter to the Plaintiffs, first of all attempting, as it is stated in the letter, to find the person who acted as agent of the Plaintiffs at *Sheffield;* and not being able to find him, they wrote a letter to *Newcastle*, the place where the Plaintiffs' manufactory was carried on. By some accident, or in consequence of the neglect of those who carried on the business of the Plaintiffs at *Newcastle*, the letter did not reach *London*, where the Plaintiffs then were, until the 9th of *August*, two days after the bill was filed, and the very day upon which the injunction was applied for, and obtained. That was not the fault of the Defendants. They did, as early as the 2d of *August*, all that it was in their power to do to remedy the fault they had committed on the 28th of *July*. If the letter had been received

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ceived in *London* before the bill was filed, the bill ought not to have been filed. That letter gives the Plaintiffs every thing they could be entitled to. It states — what the answer also states — that from the time at which an injunction had been obtained against another party (with whom the Defendants had no connection) they ceased to use the marks, and had never since used them, and did not intend to use them.

The letter, therefore, was an entire abandonment of that which constituted the Plaintiffs' demand; and it also states that, as to what had passed — ignorantly as they say — they were willing to make compensation for any injury which the Plaintiffs might have sustained through the use of the marks in question by the Defendants. It therefore gave the Plaintiffs every thing which they did or could ask for by the suit which they had instituted when the letter was received, but which they had not instituted when the letter was sent. I am told that some subsequent communication took place, which, if before me, would take off the effect of that letter: but no such communications are in evidence; and, seeing that letter in the answer, it was quite competent for the Plaintiffs so to deal with this cause as to bring those facts before the Court. I can, however, only deal with the case as it comes judicially before me.

Now I say, that having received that letter, it was not proper for the Plaintiffs to apply, *ex parte*, for the injunction; or, if they had obtained an order for it, they should not have drawn up the order. That letter made it, as to costs at least, incumbent upon the Plaintiffs to put to the test whether the Defendants were sincere in their offer, and not to go on with the suit unless they found that they were insincere. The injunction was obtained, and has not been displaced. No attempt has been

been made by the Defendants to displace it. That is quite consistent with what is stated in their answer, and in the letter to which I have referred. For what purpose, then, was the suit prosecuted? Why simply, and only, for the sake of the account; which is so small that the Plaintiffs abandon it at the hearing. Here, then, has been a very expensive suit, with no possible object but the account; which, when the cause comes on for hearing, the Plaintiffs' counsel very properly abandons. Now, under these circumstances, I think that a great deal of very useless litigation has been carried on, and that a great deal of very improper expense has been incurred. It strikes me, therefore, that this is exactly a case in which the Court is repressing useless litigation by refusing the Plaintiffs the costs of the cause. They waive the account. They must have a perpetual injunction against the use of the marks in question, but without the costs of the cause.

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## NIAS v. The NORTHERN and EASTERN RAILWAY COMPANY.

*March* 28.

THE Plaintiff moved, by way of appeal from the Master of the Rolls, who had refused the application, that the Defendants might produce and deposit with their clerk in Court, a case which they had laid before counsel, and upon which an opinion had been given, dated the 12th of *December* 1836.

A case for the opinion of counsel, stated by the answer to have reference to the matters in question in the cause, and to have been submitted to counsel after the matters in dispute in the cause had arisen, is a privileged communication, which the Defendant is not bound to produce.

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The bill was filed on the 4th of *May* 1837, and prayed that the Defendants might be decreed specifically to perform a contract which they had entered into in *May* 1836, for the purchase of certain leasehold premises at *Islington*, belonging to the Plaintiff. The Defendants, in a schedule to their answer, set forth a list of the several books, documents, and papers in their possession, which related to the matters mentioned in the bill, including, among others, the case in question; but they said that the cases for the opinion of counsel set forth in the schedule, had reference to the matters in question in the cause, and were submitted to counsel after the several matters in dispute in the cause had arisen, and bore reference thereto; and, therefore, they submitted that the same ought not to be produced.

The argument and judgment on the original motion are reported by Mr. *Keen*. (*a*)

Mr. *Wigram* and Mr. *O. Anderdon*, for the appeal motion, said, that but for the case of *Bolton* v. *The Corporation of Liverpool* (*b*), by the authority of which the Master of the Rolls considered himself bound, his Lordship intimated that he would have granted the application. That case carried the principle of protection further than it had ever been carried before; and it was not easily to be reconciled with *Preston* v. *Carr*. (*c*) At all events, in order to come within the authority of *Bolton* v. *The Corporation of Liverpool*, it was necessary that the case should be one stated and submitted with reference to a litigation, either then actually pending, or in the contemplation of the parties, and should be distinctly alleged so to be by the answer. It was not enough to say

(*a*) 2 *Keen*, 76.
(*b*) 1 *Myine & Keen*, 88.
(*c*) 1 *Y. & Jerv.* 175.

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say, as these Defendants said, that the case had reference to the matters in question in the cause, and was submitted to counsel after the matters in dispute in the cause had arisen. There was a substantial difference between a question in dispute and a question in litigation. *Storey* v. *Lord John George Lennox* (*a*) established that a party, seeking to withhold the production of documents on the ground of their being privileged communications, was bound to do so by the most nice and precise exception, clearly bringing them within the line of protection; and the Defendants had not done so here.

*The* LORD CHANCELLOR (without calling on the counsel for the Defendants).

I never entertained the least doubt as to the propriety of the decision in *Bolton* v. *The Corporation of Liverpool* (*b*). The true principle on which that case proceeds is, that parties are to be at liberty to communicate with their professional advisers with respect to matters which become the subject of litigation, without restriction, and without the liability of being afterwards called upon to produce or discover what they shall so have communicated. Whether a bill is or is not actually filed at the time, is to my mind a matter of perfect indifference. It is not pretended that a solicitor can be compelled to answer as to what his client told him with reference to an expected contest; and can it make any difference in principle, whether what passes between them is communicated by word of mouth or in the form of a case stated for advice?

The question may occur as to cases which have been long before stated for the opinion of counsel, relative to the

(*a*) 1 *Mylne & Craig*, 525. (*b*) 1 *Mylne & Keen*, 88.

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the matters which come subsequently into contest: and these, it has been held, would not be protected under the privilege of professional advice and confidential communications. (*a*)

The only doubt I can possibly entertain in this case, is, not whether the decision in *Bolton* v. *The Corporation of Liverpool* was right, but whether the circumstances relied upon as giving the title to protection are so pleaded as to bring the document in question within the rule laid down in that case; and certainly I do not feel any great doubt about it. Here is a matter in contest, which could not by possibility have arisen prior to the month of *May* 1836. The case of which production is sought, is stated to have been answered on the 12th of *December* in that year; and the bill is filed within five months from that time. The statement, in the answer, is, that the cases for the opinion of counsel had reference to the matters in question in the cause, and were submitted to counsel after the several matters in dispute in the cause had arisen, and bore reference thereto. Now, with respect to a transaction which commenced in *May* 1836, it would seem to be a very strained construction of these words to say, that although the cases had reference to the matter which was in dispute, yet they had not reference to the litigation. The natural meaning of the passage seems to be, that

(*a*) *Radcliffe* v. *Fursman*, 2 *Bro. P. C.* 514. *Toml.* ed. In *Knight* v. *The Marquess of Waterford*, 1 *Y. & Cole*, 22. Lord *Abinger* appears to have expressed some doubt, whether the principle of protection did not apply equally to all cases stated for opinion, whether they related to a cause contemplated or in progress; or to matters occurring on former occasions. But the distinction here referred to by the Lord Chancellor, was expressly taken and adopted by the learned Judges, who decided *Bolton* v. *The Corporation of Liverpool*, both upon the demurrer and the motion.

that they were cases relating to the points which formed the subject of dispute, and afterwards of litigation between the parties.

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The motion must be refused, but without costs; as the Master of the Rolls appears rather to have encouraged the appeal.

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## POWYS *v.* MANSFIELD.

1836. *Dec.* 14. 16, 17. 19, 20. 1837. *Nov.* 17.

THIS case is reported, upon the hearing of the cause before the Vice-Chancellor, in the sixth volume of Mr. *Simons*'s Reports (*a*).

Sir *Richard* and Lady *Simeon* and their Son appealed from His Honor's decree.

It is desirable to make some additions to the statement of the facts contained in the report of the hearing in the Court below.

It appeared, that the negotiations for the settlement, made on the marriage of Sir *Richard* and Lady *Simeon*, were

(*a*) 6 *Sim.* 528.

The proper definition of a person in *loco parentis* to a child is a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child.

A person may stand in *loco parentis* to a child, although the child lives with and is maintained by its father.

Parol evidence is admissible to prove that a person did mean to put himself in *loco parentis* towards a child, so far as relates to the child's future provision; and evidence of the declarations, as well as the acts of such a person, are admissible for that purpose.

If the presumption of law against double portions provided by a person in *loco parentis*, be attempted to be rebutted by parol evidence, it may be supported by evidence of the same kind.

Declarations of a person in *loco parentis* are admissible in evidence upon the question of his intention as to providing a double portion for a child to whom he stands in that relation.

A codicil republishing a will, makes the will speak as from the date of the codicil, for the purpose of passing after purchased lands; but not for the purpose of reviving a legacy revoked, adeemed, or satisfied.

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were made with Sir *John Barrington*, and that Sir *John's* solicitors were employed by him to prepare the settlement made on the occasion of Lady *Simeon's* marriage, as well as of Mrs. *Powys's* marriage, and that *Fitzwilliam Barrington* did not interfere.

The settlement made upon the occasion of the marriage of *Fitzwilliam Barrington* and his wife, was proved in evidence, and bore date the 4th of *July* 1789.

There was also, in evidence, a bond, dated the 11th of *July* 1797, from Sir *John Barrington* to *Fitzwilliam Barrington*, for securing to the latter an annuity of 400*l.* Certain diaries kept by *Fitzwilliam Barrington*, in the lifetime of his brother, were received in evidence *de bene esse.*

By the first witnessing-part of the settlement made on the marriage of the Plaintiff, *Henry Philip Powys*, with *Julia Barrington*, an annuity of 500*l.* belonging to the *Powys* family, being part of a larger annuity, charged upon the revenues of the Post-office, by letters patent of King *George* the First, was conveyed to *William Browne* and *Edward Philip Cooper* (*a*), to the use of themselves for a term of ninety-nine years, to be computed from the solemnization of the marriage, if the Plaintiff and *Julia Barrington*, or either of them, should so long live, upon certain trusts therein mentioned; and from and immediately after the decease of the survivor of them (the Plaintiff and *Julia Barrington*), and the determination of the term, and in the event that there should thereafter be issue male, either of Sir *John Barrington* or *Fitzwilliam Barrington*, who should live to

(*a*) Described as *Edward Cooper*, Fellow of *St. John's College, Oxford*, to distinguish him from another party to the deed of the name of *Edward Cooper.*

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to attain the fee-simple of the *Swainston* estates, or by the happening of any other event, the reversion in fee of Sir *John Barrington* in those estates should be destroyed or barred, and the charge of 10,000*l.*, therein-after made by Sir *John Barrington* on the same estates, upon the trusts after declared, should be rendered of no effect, and it should become impossible that the same sum should be raised under the said charge, then to the use, intent, and purpose that *Browne* and *Cooper* should stand seised of the annuity, to the use of such one or more of the younger children of the marriage, as the Plaintiff and *Julia Barrington* should jointly appoint; and in default of, and subject to such appointment, to the use of all the younger children of the marriage, in fee, in equal shares as tenants in common, and for default of all such issue, or in case the charge thereinafter made by Sir *John Barrington* should not be defeated or destroyed, or prevented as aforesaid from taking effect, but should take full effect, and the said 10,000*l.* should become raiseable by virtue thereof, then and in either of the said events, upon trust, and to the use, intent, and purpose, that *Browne* and *Cooper* should stand seized of the annuity, after the death of the survivor of them, the Plaintiff and *Julia Barrington*, to the use of *Philip Lybbe Powys* (the father of the Plaintiff) for his life, and after his decease to and for the use and benefit of the Plaintiff, his heirs and assigns for ever.

Two of the witnesses examined on the part of the Defendants, Sir *Richard* and Lady *Simeon* and their son, were Mrs. *Williams*, a niece of Sir *John Barrington*, but not one of the daughters of his brother, and Miss (*Jane Elizabeth*) *Barrington*, one of his brother's six daughters.

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In answer to the ninth interrogatory, Mrs. *Williams* stated that she was staying in the house with Sir *John Barrington* when he made his will, in the year 1813, and previously to the marriage of Lady *Simeon*, and that he mentioned to the witness and another niece, who was since dead, the circumstance of his having made his will; and said that, since he had discovered that he had a power of disposing of his estates, he had made his eldest niece, meaning the eldest daughter of *Fitzwilliam Barrington*, an eldest son, and had given her younger sisters 10,000*l.* a piece, payable on the death of their father; and that, in order to raise these portions, he had appropriated the tithes of some of his *Essex* property: and that if, at the death of his brother, there should be any deficiency in the fund so to be raised, it was to be charged upon the *Swainston* property, which he had left to his eldest niece; and he added, that he considered that 10,000*l.* was a good fortune for a gentleman's younger daughter; and that, about the same time, Sir *John Barrington* took the witness and her late sister, and shewed them where he had deposited his will. The witness went on to state that, between that time and the marriage of her cousin, *Julia Barrington*, Sir *John Barrington* alluded several times, in conversation with the witness, to the aforesaid provision which he had made for the younger daughters of his brother, and usually repeated the observation that he considered 10,000*l.* to be a good fortune for a gentleman's younger daughter; and that, after the marriage of *Julia Barrington*, Sir *John Barrington* mentioned to the witness, on the first occasion of her going to see him after that event, that he had settled 10,000*l.* upon his niece *Julia*, to be payable after the death of her father, and he repeated the fund out of which this portion was to be paid, namely, out of the accumulations of the tithes; and

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and the witness distinctly understood from him that the 10,000*l.* which he had provided for his niece *Julia* by his will, and the 10,000*l.* secured by the settlement made on her marriage, were one and the same sum, as he uniformly declared that the fortune of his niece *Julia*, as well as of each of the younger daughters of his brother, was to be 10,000*l.*

Miss *Barrington*, in her answer to this ninth interrogatory, stated that Sir *John Barrington* had had frequent conversations with her on the subject of her sister, Lady *Simeon's*, settlement; that he had often said that he intended to place her in the situation of heir to his *Swainston* estate. The witness recollected his stating, that he had settled 10,000*l.* on her sister *Julia*, on her marriage with the Plaintiff; that Sir *John Barrington* had told her that the said 10,000*l.* was the portion or fortune of her sister *Julia*; and that she had heard from him that he intended to give each of his nieces (the witness and her sisters) a similar sum of 10,000*l.*

Another witness, examined on the part of the Defendants, Sir *Richard* and Lady *Simeon* and their son, was *Thomas Cocks*, who was the confidential medical attendant of Sir *John Barrington* in *Essex*. Mr. *Cocks* stated, in answer to the ninth interrogatory, that he was on terms of intimacy and confidence with Sir *John Barrington*, from about the year 1816 until his death; that, within the last two months of his life, he frequently spoke to the witness upon family matters. The witness could not undertake to recollect the particulars of those conversations; but he remembered that the general purport and effect of them was, that Sir *John Barrington's* estate at *Swainston* would go to the eldest son of his eldest niece, now Lady *Simeon*, and that he had amply provided for all the younger daughters of his brother after

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his brother's death, by portions secured on that estate; and the witness thought he understood from him that a fund was to be formed by the accumulations of the great tithes of *Hatfield Broad Oak*, so as to make up to the possessor of the *Swainston* estate what he would have to pay in respect of the portions of the younger daughters of *Fitzwilliam Barrington*. The witness did not recollect Sir *John Barrington* mentioning the particular sum which he had left to each of his younger nieces, the daughters of his brother; he did not remember his alluding to the marriage, or intended marriage, of his niece *Julia*, or to any settlement made on that marriage, nor did he ever expressly mention whether the provision by his will was to be in lieu of, or in addition to any provision made by any settlement upon his niece *Julia*; but the witness always collected and understood from him that he had left all the younger daughters of his said brother alike; and he never spoke of having provided for one of them more than for another.

Mrs. *Williams* stated, in answer to the twentieth interrogatory, that she repeatedly before, and occasionally after the marriage of Miss *Julia Barrington*, heard Sir *John Barrington* speak of his having left his property at *Swainston* to his eldest niece Lady *Simeon*, and of his having made her an eldest son, and of his having charged the portions of 10,000*l.* a piece to each of the younger daughters of his brother, upon the fund to be formed by the accumulations of the tithes in *Essex*; and that in case that fund should be insufficient at his brother's death to pay those portions, he had charged the deficiency upon the *Swainston* property. The witness also stated, that Sir *John Barrington* mentioned to her, after the marriage of Miss *Julia Barrington*, that the 10,000*l.* secured by the settlement made on that event was to be payable at her father's death,

death, and out of the accumulations of the tithes; and Sir *John Barrington* certainly, as far as the witness could collect, did not consider that the charges on that fund were at all increased by the settlement.

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Miss *Barrington* stated, in answer to the same interrogatory, that she had heard Sir *John Barrington* declare, that he intended to make Lady *Simeon* his heiress to his *Swainston* estates; and that he intended to give 10,000*l.* to each of her sisters: that she had heard Sir *John Barrington* say that he intended the accumulating rents of the tithes in *Essex* should be applied to the payment of the five sums of 10,000*l.* which he intended to give to his nieces, in order that the *Swainston* estates might not be burdened or diminished by providing such sums; that it was his wish that the accumulations should amount to 50,000*l.*, in order that there might be no charge in that respect on the *Swainston* estates; and she verily believed that he had no intention of giving more than one sum of 10,000*l.* to Mrs. *Powys* or her children.

The case was most elaborately argued by Sir *Charles Wetherell*, Mr. *Wigram*, Mr. *Wray*, and Mr. *Bethell*, in support of the appeal, and by Mr. *Knight*, Mr. *Jacob*, Mr. *Walker*, and *Mr. Chandless*, for the Plaintiff, and his infant son, in support of the Vice-Chancellor's decree.

Mr. *Jemmett*, appeared for the Defendants, the trustees under Sir *J. Barrington's* will.

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*The* LORD CHANCELLOR.

1837.
*Nov.* 17.

The facts of this case being already in print in the sixth volume of Mr. *Simons'* *Reports* (*a*), it is not necessary

(*a*) 6 *Sim.* 528.

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necessary for me to detail them further than may be necessary to explain the observations I shall have to make upon some of the points which arise.

The case is one of much importance, not so much on account of the property in question, which, however, is considerable, as because it raises questions as to which the rules and principles of this Court are not very easily to be laid down or defined, and as to which the authorities are, unfortunately, not very consistent. Not finding myself able to concur in the judgment of the Vice-Chancellor, I have most carefully examined the grounds upon which it is founded, and have anxiously considered the authorities applicable to the subject.

Some points have been properly assumed, and may be considered as settled points, upon which the argument on each side must proceed. It is not to be disputed, that if Miss *Julia Barrington* had been a daughter, instead of being a niece of Sir *John Barrington*, the provision made for her by him upon her marriage would have been an ademption of the legacy given to her by his will of 1817. I do not understand the Vice-Chancellor to doubt this, in the observations which are to be found at the 563d page of the report. If that be so, it is, I apprehend, equally clear, and so I understand the Vice-Chancellor to assume, that the same consequence would follow, if Sir *John Barrington* ought to be considered as having placed himself in *loco parentis;* but the Vice-Chancellor rests his judgment principally upon this, that Sir *John Barrington* ought not to be considered as placed in *loco parentis.* The first point, therefore, to be considered is, whether that be correctly so assumed; and, no doubt, the authorities leave, in some obscurity, the question as to what is to be considered as meant by the expression, universally adopted, of one in *loco parentis.* Lord *Eldon*, however,

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however, in *Ex parte Pye* (*a*) has given to it a definition which I readily adopt, not only because it proceeds from his high authority, but, because it seems to me to embrace all that is necessary to work out and carry into effect the object and meaning of the rule. Lord *Eldon* says, it is a person "*meaning* to put himself *in loco parentis*; in the situation of the person described as the lawful father of the child;" but this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child. The relative situation of the friend and of the father may make this unnecessary, and the other benefits most essential.

Sir *William Grant*'s definition is, "A person assuming the parental character, or discharging parental duties" (*b*), which may seem not to differ much from Lord *Eldon*'s, but it wants that which, to my mind, constitutes the principal value of Lord *Eldon*'s definition, namely, the referring to the intention, rather than to the act of the party. The Vice-Chancellor says, it must be a person who has so acted towards the child as that he has thereby imposed upon himself a moral obligation to provide for it; and that the designation will not hold, where the child has a father with whom it resides, and by whom it is maintained. (*c*) This seems to infer that the

(*a*) 18 *Ves.* 140.; see p. 154.
(*b*) See 19 *Ves.* 412.
(*c*) See 6 *Sim.* 556.

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the *locus parentis* assumed by the stranger must have reference to the pecuniary wants of the child; and that Lord *Eldon*'s definition is to be so understood; and so far I agree with it; but I think the other circumstances required are not necessary to work out the principle of the rule, or to effectuate its object. The rule, both as applied to a father and to one *in loco parentis*, is founded upon the presumed intention. A father is supposed to intend to do what he is in duty bound to do, namely, to provide for his child according to his means. So, one who has assumed that part of the office of a father is supposed to intend to do what he has assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow. The having so acted towards a child as to raise a moral obligation to provide for it, affords strong inference in favour of the fact of the assumption of the character; and the child having a father with whom it resides, and by whom it is maintained, affords some inference against it; but neither are conclusive.

If, indeed, the Vice-Chancellor's definition were to be adopted, it would still be to be considered, whether, in this case, Sir *John Barrington* had not subjected himself to a moral obligation to provide for his brother's children, and whether such children can be said to have been maintained by their father. A rich unmarried uncle, taking under his protection the family of a brother, who has not the means of adequately providing for them, and furnishing, through their father, to the children, the means of their maintenance and education, may surely be said to intend to put himself, for the purpose in question, in *loco parentis* to the children, although they never leave their father's roof. An uncle so taking such a family under his care, will have all the feelings, intentions, and objects, as to pro-

viding for the children, which would influence him if they were orphans. For the purpose in question, namely, providing for them, the existence of the father can make no difference. If, then, it shall appear, from an examination of the evidence, that Sir *John Barrington* did afford to his brother the means of maintaining, educating, and bringing up his children according to their condition of life; and that the father had no means of his own, at all adequate to that purpose; that this assistance was regular and systematic, and not confined to casual presents, the repetition of which could not be relied upon; that he held out to his brother and his family, that they were to look to him for their future provision, it will surely follow, if that were material, that Sir *John Barrington* had so acted towards the children as to impose upon himself a moral obligation to provide for them, and that the children were, in fact, maintained by him, and not by their father. But it has been said, that Sir *John Barrington* would not have been guilty of any breach of moral duty, if he had permitted the property to descend to his brother. Undoubtedly, he would not, because that would have been a very rational mode of providing for the children; but if he had reason to suppose that his brother would act so unnaturally as to leave the property away from his children, Sir *John Barrington* would have been guilty of a breach of moral duty towards the children, in leaving the property absolutely to their father. I should, therefore, feel great difficulty in coming to a conclusion, that Sir *John Barrington* had not placed himself in *loco parentis* to these children, even if I thought every thing necessary for that purpose, which the Vice-Chancellor has thought to be so.

Adopting, however, as I do, the definition of Lord *Eldon*, I proceed to consider whether Sir *John Barrington* did mean to put himself in *loco parentis* to the children,

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children, so far as related to their future provision. Parol evidence has been offered upon two points; first, to prove the affirmative of this proposition; secondly, to prove, by declarations and acts of Sir *John Barrington*, that he intended the provision made by the settlement should be in substitution of that made by the will. That such evidence is admissible, for the first of these purposes, appears to me necessarily to flow from the rule of presumption. If the acts of a party standing in *loco parentis* raise, in equity, a presumption which could not arise from the same acts of another person not standing in that situation, evidence must be admissible to prove or disprove the facts upon which the presumption is to depend, namely, whether, in the language of Lord *Eldon*, he had *meant* to put himself in *loco parentis;* and, as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that purpose; and if the evidence establish the fact, that Sir *John Barrington* did mean to place himself in *loco parentis*, it will not be material to consider, whether his declarations of intention as to the particular provision in question be admissible *per se*, because the presumption against the double portions, which, in that case, will arise, being attempted to be rebutted by parol testimony, may be supported by evidence of the same kind.

I, at present, look to the evidence, for the purpose of seeing how far it supports the proposition that Sir *John Barrington* meant, for the purpose of making provision for the family in general, and particularly for Miss *Julia Barrington*, to place himself *in loco parentis*. In the first place, it appears that Sir *John Barrington* allowed his brother 400*l.* per annum, which he, in the year 1797, voluntarily bound himself to pay during his life. I take no notice of Sir *Fitzwilliam Barrington*'s diary, as I do not consider that it can be evidence between these parties of the facts it contains, there being no proof that it was known

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known to Sir *John Barrington*. Sir *John Barrington's* banker's books prove the payment to his brother of large sums in addition to this annuity; but his letter of the 11th of *July* 1818, referred to by the Vice-Chancellor, is the most important document, shewing that he had taken his brother's family under his protection, and that his principal object in the application of his property was to provide for them; that he had been always preparing to supply his brother with cash *en masse;* that, upon Lady *Simeon's* marriage, he had made a disposal of the *Isle of Wight* property for the benefit of his brother's family; and that upon Mrs. *Powys's* marriage, he had made another will, improved upon, as he hoped, by the destination of the tithe property in *Essex*, in trust to form a fund to aid the very heavy demands that would press upon the *Isle of Wight* estate: that in the forming of those wills, he had acted altogether free from any personal consideration, following the order by priority of birth, as the rule for it. Part of these demands upon the *Isle of Wight* estate was the provision for Mrs. *Powys;* and it is to be observed that he speaks of the object of the arrangement in 1817 as being to provide an additional fund to answer the pre-existing demands, and not as intended to increase them. The testimony of the witnesses carry this part of the case somewhat further, and prove that the brother's family were, in fact, maintained by Sir *John Barrington;* the income of the brother not exceeding 400*l.* or 500*l.* per annum, and Sir *John* making up the deficiency of the income to discharge the expenses of the family, which were considerable. It cannot be material whether the music-master, the drawing-master, and the dress-maker, received what was due to them by the hands of the father, as it was the uncle who furnished the means. The arrangements upon Lady *Simeon's* marriage in 1813 are important, as shewing that, at that time, Sir *John Barrington* treated his brother's family as his own, in the disposition of his property,

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property, and destined 10,000*l.* as the portion of each of his younger nieces. The letter of the 11th of *July* 1818, shews that, at the time of making the will of the 28th of *March* 1817, Sir *John Barrington* knew of the intended marriage of his niece *Julia*, and that such will was made, as he says, upon the occasion of such marriage. At that time, therefore, this will proves, that he intended that 10,000*l.*, and no more, should be the portion of Mrs. *Powys*. Nothing can more completely shew the assumption of the office of parent towards the children, so far as relates to the disposition of property, than this circumstance. Had his nieces been his own children, the disposition and arrangement would probably have been the same, so far as they affect them. If Sir *John Barrington* had died between the 28th of *March* and the 2d of *June* 1817, Miss *Julia Barrington*'s fortune would have been but 10,000*l.*; but that 10,000*l.* would have been so settled by the will as to have precluded the necessity of any other settlement of this 10,000*l.* But although this object was so attained, and the chances of life guarded against by this will, the negociation proceeded with the intended husband. To this negociation the uncle was the sole party on behalf of the intended wife, the father not interfering. On the 2d of *June* the settlement is executed: the father is no party to it, but the uncle is, and he puts in settlement a sum of 10,000*l.*, charged upon the reversion of the *Swainston* estate, which was, by the will, to go in succession to the nieces, for the advancement in life, and to provide for the maintenance, of the niece who was about to marry. Did not Sir *John Barrington*, by this settlement, exercise the office or duty of advancing his niece in life, and of providing for her maintenance, and that by a sum charged upon an estate settled upon her eldest sister and herself in succession? Was not this a portion? and if so, was not the 10,000*l.* appropriated to the same purpose, and ultimately charged upon the same property, by the

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the will, also intended as a portion? But, if these were given as portions, and are so to be considered, the giving them affords the strongest evidence of an intention in the giver to place himself for that purpose *in loco parentis;* and on the other hand, if the assumption of that character be proved by other means, then the sums so given must be considered and treated as portions. I consider both points established by the evidence, and the proof of either is sufficient proof of the other, and so to raise the presumption in equity that both gifts were not intended to take effect; a presumption not only not rebutted by the evidence for the Plaintiff, but, in my opinion, established beyond all doubt by the evidence of the Defendants; for, independently of the presumptions in equity against double portions, and of the positive testimony of several witnesses that Sir *John Barrington* intended that his nieces should have only one sum of 10,000*l.*, there is the strongest ground for presuming, from the documents, that such must have been his intention. That such was his intention in 1813 is quite clear; that he continued to entertain the same intention from that time up to and at the time of making his will in 1817, is also clear, as he not only does not give his niece *Julia* any more, but disposes of all his property, appropriating 10,000*l.* and no more, for her. What ground is there for supposing that he had altered his intention by the 20th of *April*, after making his will? No stipulation for that purpose appears on the part of the intended husband. Ten thousand pounds was the whole he stipulated for, and the whole he had any reason to expect. Had Sir *John Barrington*, at the time he executed the settlement, an intention that his niece should have another 10,000*l.* under his will, would he not have made such additional sum the subject of the negotiation, instead of leaving it as it stands upon the will, which gives to the intended husband the uncontrolled life interest in that sum?

But

But upon what ground is the direct evidence of Sir *John Barrington*'s intention with respect to those two sums to be rejected? The whole question is one of intention; and upon such an issue the declarations of the party are, I conceive, admissible; and so the cases have decided. It has been said that the trusts of the 10,000*l.* by the settlement differ from those prescribed by the will; and that the will charges the *Hatfield Broad Oak* tithes, and other property, with the payment; whereas, by the settlement, the reversion of the *Swainston* estates alone is charged.

After the decision of the House of Lords in *Wharton* v. *Lord Durham*, the variation in the trusts cannot be relied upon. That case having been argued before I had the honour of a seat in the House of Lords, I abstained from taking any part in the judgment, and I was glad to be enabled to do so, because I had been counsel in the cause; but I fully concur in that judgment.

As to the observation that the 10,000*l.* was, by the settlement, only charged upon the reversion of the *Swainston* estate, and might, therefore, have failed altogether, or have been postponed for a long period, it is to be observed that, although the charge upon the reversion was, by possibility in law, liable to fail by Sir *John Barrington* or his brother having issue male who should attain twenty-one, and bar the reversion, yet the 10,000*l.* portion could not, in that event, have failed, it being, in that event, charged upon the post office annuity: so that the charge, either by itself, or by being the means of purchasing the charge upon the post-office annuity, did, in fact, secure the 10,000*l.* But where was the probability, in fact, of the charge upon the reversion being defeated? I am not aware that the age of the parties is distinctly

distinctly in evidence; but *Fitzwilliam Barrington* had been married twenty-eight years, and had no son, and Sir *John Barrington*, the best judge of the probability of his marrying and having issue male, evidently considered that event as one not to be taken into consideration, so that the reversion of the *Swainston* estate, although, in law, contingent, was, in fact, equal in value to an absolute estate, and must have been so considered by the parties: nor was the omission of the other property in the settlement necessarily any departure, in fact, from the intention declared by the will of making the other property primarily liable to the 50,000*l.*; for, if such other property was not thought equal to raising the whole 50,000*l.*, it was immaterial that the 10,000*l.*, part of it, was to be raised out of the reversion.

It has been supposed that the evidence of Mrs. *Williams* and of Miss *Barrington* to the twentieth interrogatory, and of Mr. *Cocks* to the ninth, shew that Sir *John Barrington* intended that both sums of 10,000*l.* should be paid. What Mr. *Cocks* says, "he thinks he understood," is not sufficiently certain or specific to be relied upon. Miss *Barrington* does not give any date to the conversation referred to. It may have taken place before her sister *Julia*'s marriage. The deposition of Mrs. *Williams* referred to, that is, her answer to the ninth interrogatory, explained by her answer to the twentieth, speaks of the 10,000*l.* secured by the settlement made on the marriage being to be paid out of the tithes, which is clearly a mistake; but she is positive that there was to be only one sum of 10,000*l.*

It has been argued that the codicil of the 23d of *June* 1818, confirming the will, makes the will speak as of the date of the codicil, and therefore revives the legacy, if it had been adeemed by the settlement; and, at

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at all events, is evidence of an intention that the legacy should take effect. It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest, and so revoke any codicil by which a legacy given by the will had been revoked, and undo every act by which it may have been adeemed or satisfied. The cases are consistent with this rule, as *Drinkwater* v. *Falconer* (*a*), *Monck* v. *Lord Monck* (*b*), *Booker* v. *Allen* (*c*); and the case of *Roome* v. *Roome* (*d*) is not an authority against these decisions, because the codicil was not considered in that case as reviving an adeemed legacy, it having been decided that there was no ademption; but the codicil was referred to as an additional proof that no ademption was intended. And as to the argument that the codicil must, at any rate, be evidence of an intention that both sums should be paid, the same answer may be given which has been given to a similar argument in other cases; namely, that the testator, if he knew the rule of law, must have known that the codicil would not revive the adeemed legacy, and, therefore, it was unnecessary for him to mention it: the probability, however, is, that his attention being directed to the only object of the codicil, the words of confirmation of the will were introduced as words of course, without any reference to the legacy in question.

I have

(*a*) 2 *Ves.* sen. 623.
(*b*) 1 *Ball & Beatty*, 298.
(*c*) 2 *Russ. & Mylne*, 270.
(*d*) 3 *Atk.* 181.

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I have not said any thing as to the identity of purpose in the two gifts, namely, making a provision for the niece, in contemplation of her marriage; but there are some strong observations of Lord *Eldon* upon that subject, in the case of *Trimmer* v. *Bayne*. (*a*) Indeed, the facts of that case, in almost every particular, strongly resemble the present. It was the case of a natural child, the father of which is, for this purpose, considered as a stranger. The trusts of the provision by the will and the marriage settlement materially varied. Verbal declarations were received in evidence of the father's intention; and the provision by the will, though not settling the property upon the parties to the marriage, and the issue, as in this case, had reference to the child's marriage; upon which Lord *Eldon* observes, that if there had been no general rule as to the ademption of the legacy by the settlement, it would be well worthy of discussion, whether it ought not to prevail in that particular case, the legacy being given with express and peculiar reference to the marriage of the daughter. Unless, therefore, it be adopted as a positive rule, that no one can, for these purposes, put himself in *loco parentis* to a child who is living with its father, this case of *Trimmer* v. *Bayne*, cannot in substance be distinguished from the present.

There is then the case which I before mentioned, of *Monck* v. Lord *Monck* (*b*), which bears a strong resemblance to the present, in many points. In that case a testator had by will given 5000*l.* to his brother, and contemplating his marriage, directed that in that event it should be applied as a provision for the family. He afterwards advanced 1000*l.* for his brother, and, upon his brother's marriage settled 4000*l.* upon him and his family. Lord

(*a*) 7 *Ves.* 508. (*b*) 1 *Ba. & Be.* 298.

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Lord *Manners* held, that he had placed himself in *loco parentis*, and that the legacy was adeemed by the settlement, although in that case the evidence to shew the assumption of the office of parent was only to be found in the instruments themselves. In that case it was also decided that parol evidence was admissible in such a case, to shew the intention, and that a codicil ratifying and confirming a will did not set up an adeemed legacy. Lord *Manners* also relied upon the identity of purpose of the two provisions, though that was certainly not stronger than in the present case. *Booker* v. *Allen* (*a*), also embraces many of the points in question in this cause, and except that the legatee had no father, was a case much less strong than the present, against the double portions: but Sir *J. Leach* M. R. held that the testator had placed himself in *loco parentis*, that the presumption therefore was raised against double portions, that evidence of intention was admissible, and that the codicil did not set up an adeemed legacy.

Upon these authorities, and for these reasons, I am of opinion that the evidence adduced to prove that Sir *John Barrington* had placed himself *in loco parentis* to his niece, for the purpose of providing for her, is admissible for that purpose, and establishes that point, although the niece was living with her father: that the presumption against double portions, therefore arises, and is not repelled by the evidence adduced by the Plaintiff; but on the contrary, that the result of the whole of the evidence is very strong to shew that Sir *John Barrington* intended that his niece should have only one sum of 10,000*l.*, and that the legacy given by the will, therefore, should not take effect. I am also of opinion, that the legacy so adeemed by the settlement, was not set up again by the codicil.

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(*a*) 2 *Russ. & Mylne*, 270.

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The result therefore is, that the Plaintiff has failed in so much of his suit as sought payment of the 10,000*l.* legacy, and that so much of the decree as provided for payment of the legacy must be reversed without costs, and so much of the bill as prayed payment of the legacy be dismissed with costs.

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## BANNATYNE *v.* LEADER.

1838. *Jan.* 24. 27.

The institution of a suit under sect. 88. of the Bankrupt Act, 6 *G.* 4. *c.* 16., may be authorised by creditors present by attorney as effectually as by creditors present in person.

THIS suit was instituted in the names of the creditors' assignees and the official assignee of a bankrupt, for the purpose of recovering some property which was supposed to belong to the bankrupt's estate.

The institution of the suit had been authorised by a meeting composed of creditors of the bankrupt, and persons acting under power of attorney from creditors. One third in value of the creditors were not actually present in person; but if those who appeared by attorney were to be considered as being present, more than one third in value of the whole body of creditors were present, either personally or by proxy.

A motion was now made on behalf of the official assignee, that his name might be struck out of the bill as a co-plaintiff with the creditors' assignees.

Mr. *James Russell*, in support of the motion.

The meaning of the statute is that one third in value of the creditors shall be personally present at a meeting at which the institution of a suit is determined on. When a person is doing an act affecting his own interests only,

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he may delegate his rights or his powers, but a right which does not flow out of his own interest, and is only given him by statute, cannot be delegated, unless the statute itself gives him the power of delegating it. The consent, under the Bankrupt Act, to the institution of a suit by the assignees binds the estate, and makes the suit the suit of the estate, and entitles the assignees, as Plaintiffs, to costs out of the estate. The 88th section, throughout, points at creditors being personally present, and it is obviously just that the personal presence of the creditors should be required, as they are to discuss the question, whether the proposed suit or proceeding is for the benefit of the estate, and there may be, as there was in this case, considerable difference of opinion in the meeting. The exercise of much judgment may be necessary, but it cannot be expected that a deputy, who may know scarcely any thing about the matter, and feels no interest in it, can exercise much judgment; and it would be very unjust, that the interests of creditors whom he is not deputed to represent should be bound by his acts. A man cannot hear reasoning and come to conclusions by deputy.

The other enactments of the same statute clearly shew that the personal presence of the creditors was contemplated for such a purpose as that now in question. By the bankrupt law, as it originally stood, no creditor could vote in the choice of assignees unless he were personally present, and a statute of *George* the Second (*a*) allowed creditors to vote for assignees by attorney, only in cases in which they lived at a distance. The present act has extended the power of voting for assignees by attorney, so as to provide an ample remedy for the inconvenience which was before sustained; but the very circumstance of such power being expressly given for the

(*a*) *5 G. 2. c. 30.*

the purpose of voting in the choice of assignees, shews the necessity of an express power for that purpose.

Mr. *Richards, contrà.*

It has for many years been considered and treated in practice as clear, that creditors might vote by proxy upon the question of the institution of suits relating to the bankrupt's property. There is nothing in the act to take this out of the general rule, that what a man may do by himself he may do by attorney. It constantly happens that many of a bankrupt's creditors live at a great distance, and cannot possibly attend in person; and if they could not attend by attorney, they could have no control over the proceedings.

The 88th section does not mean that the creditors should be personally present. The 102d and 133d sections use the same expression, viz. creditors there "present;" and yet it clearly appears from other parts of the statute that the acts authorised by the 102d and 133d sections may be done by attorney. The last section but one of the statute provides that the act shall be construed beneficially for creditors; but a construction, such as is contended for on the other side, which might exclude nine-tenths of the creditors from all participation in the management of the affairs of the bankrupt's estate, and subject them to the control of the remaining tenth, could not be considered beneficial for the creditors generally. In *Ex parte Llewellyn* (*a*) it was taken for granted that in such a case as this creditors might vote by attorney.

Mr. *James Russell*, in reply.

*The*

(*a*) 1 *Deacon*, 474.

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*The* LORD CHANCELLOR.

The question in this case is, whether the act which under section 88. of the Bankrupt Act, 6 *G.* 4. *c.* 16. is to be authorised to be done, may be so authorised by a majority of creditors who should have proved, acting by attorney, under a regular power of attorney for that purpose.

I take it for granted that the power of attorney in the present case was sufficiently large to embrace a power to give consent to the institution of a suit.

Now, the object of that section was not only to prevent assignees from improvidently dealing with the estate, without the control of the creditors, but in certain cases it gives an indemnity to the assignees, and gives creditors the power of interfering and regulating their proceedings. Its object applies equally to creditors who cannot attend and to those who can; and it is obvious, that if the consent which the section requires cannot be given by power of attorney, a great part of the object of that section will be defeated, for it would in many cases give a resident minority a power to bind an absent majority, who were represented under powers of attorney only, and might, in cases in which the consent of one third in value of the creditors is required to be present, prevent any thing being done under that section at all.

It would, therefore, be productive of great inconvenience, and, in many cases, would defeat the purposes of that section, if it were held that absent creditors might not vote by means of powers of attorney. But it is said that I ought not to hold that they can do so, because the section speaks of the concurrence of the majority

jority of the creditors present being necessary, and because it is contrary to principle that a man should be able by his deputy to do any act which should affect the interests of other parties. Now, although the consent to the institution of a suit may in its result affect the interests of other creditors, yet it is given by each consenting party with reference to his own interest alone, and it is the law which makes the assent of a majority binding upon the others.

The party acting under the power of attorney acts for his own principal alone. It is clear that a party may, generally, authorise another to give such assent for him; and the question therefore is, whether this act of parliament prohibits such an act as that now in question being done by attorney. It appears that there are four cases in which the majority is to bind the others. The first is the choice of assignees, as to which, by the sixty-first section, it is expressly provided that any person authorised by letter of attorney from any creditor shall be entitled to vote; and it is argued that the circumstance that an express power of voting by attorney is given by this section, leads at least to the conclusion that in those cases in which an express power is not given, the legislature intended to make it essential that the act should be performed by the creditor in person. But it is to be observed, that although a power of attorney would authorise the assenting to any act in which the principal is interested, it does not follow that it would authorise a voting by proxy, as that is an act which directly affects the interests of others.

Signing the certificate, like assenting to a suit being instituted, affects in its consequences the interests of others; but it is in itself only the assent of the particular creditors, and, by sect. 122., the certificate is to

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be signed by a certain proportion in number and value of the creditors who have proved debts. In this section, no power is given to sign the certificate under a power of attorney for a creditor; but sect. 124. assumes that such a power would exist under the former section, for sect. 124., though it does not give any such power, prescribes the evidence to be required of the execution of powers of attorney, under which such signature for absent creditors shall be made.

But it is said that section 88. requires that there shall be the consent of a major part, in value, of creditors present at any meeting; and it is contended that this expression excludes creditors who are absent and acting by attorney. Whether that would or would not be a just construction of the terms of the section, need not be considered, for other sections of the same act have put a construction upon this use of the word "present." Sect. 61. having given to creditors absent at the second meeting, the right to vote by attorney in the choice of assignees, sect. 102. directs, that at the meeting of creditors for the choice of assignees, the major part in number and value of such creditors there present, which must mean of the creditors voting in the choice of assignees, may direct where the money shall be kept.

It appears, therefore, that of the three acts of a similar nature authorised by the act, namely — the assenting to a suit being instituted, or compounding or submitting disputes to arbitration — the directing the custody of the money — and the signing the certificate — the act clearly recognises the right of creditors to act by attorney in two of them, namely, the directing where the money shall be kept, and the signing the certificate, although in neither does it directly give it; and in the former, treats creditors so acting by attorney, as creditor:

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tors present. It is therefore a fair inference that in the third, namely, the authorising a suit, a similar privilege was intended.

Although the 88th section speaks of creditors present, I have before said that I consider the act in question one which is capable, in its nature, of being performed under a power of attorney; and that it would require positive enactment, or a fair inference of a contrary intent in the act, to prevent it. So far from finding any such enactment or fair inference, I think that all the fair inferences from the act are in favour of the right being so exercised.

I am therefore of opinion, that the creditors described in sect. 88., include creditors acting and present by attorney, authorised by regular powers of attorney.

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## GREEN *v.* WESTON.

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*Dec.* 15, 16. 20.

The official assignee of a bankrupt's estate filed a bill against the respective personal representatives of two successive assignees, for an account and payment of monies which, having formed part of the bankrupt's assets, were lying in the hands of the assignees at the time of their respective deaths, and were never afterwards accounted for. The monies consisted, partly of unclaimed dividends, partly of sums set apart to answer unsubstantiated claims, and partly of undivided surplus. Both the assignees died before the passing of the 6 *G.* 4. *c.* 16. The bill was filed in 1834, and in the following year the 5 & 6 *W.* 4. *c.* 29. was passed, by which the 110th section of the former act was repealed, and the unclaimed dividends of a bankrupt's estate were devoted to certain public purposes therein specified: Held, that the official assignee was competent to maintain such a suit, and that the particular creditors to whom the unclaimed dividends had been allotted, and the Attorney-General, were not necessary parties to it.

UPON the bankruptcy of *Menzies Baillie*, which happened in the year 1796, certain persons were chosen his assignees, of whom *William Weston* the elder became

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became the sole survivor, upon the death of his co-assignee *Alexander Burrell*, in the year 1803.

In an account rendered to the commissioners on the 2d of *May* 1818, *Weston* the elder debited himself, among other monies, with a sum of 916*l.* 18*s.* 5*d.*, as being dividends which had been declared upon the debts of creditors who had proved under the commission, but had not been claimed, and which sum he had received from the deceased assignee, *Burrell*. By an order of dividend made by the commissioners on the same day, *Weston* the elder was directed to retain, out of the monies then in his hands, in addition to the sum of 916*l.* 18*s.* 5*d.*, a sum of 529*l.* 14*s.* 3*d.*, to answer the dividends which had been declared on claims not then substantiated; and after payment of the dividends thereby ordered to be paid out of the residue, there remained in his hands an undivided surplus of 267*l.* 8*s.*

*William Weston* the elder died in the month of *June* 1818, leaving a will, of which he appointed his son, *William Weston* the younger, and his grandsons, the Defendants *Henry Weston* and *George Weston*, executors, all of whom proved his will.

On the 29th of *June* 1819, *William Weston* the younger was appointed sole assignee, and the usual assignment of the bankrupt's estate and effects was made to him. On the 25th of *August* 1821, at a meeting of the commissioners, held under a renewed commission in the same bankruptcy, *Weston* the younger rendered an account in which he debited himself with the aforesaid sums of 529*l.* 14*s.* 3*d.* and 267*l.* 8*s.*, not, however, including or taking any notice of the 916*l.* 18*s.* 5*d.* retained by his father in respect of the unclaimed dividends; and he also debited himself with certain other sums, as part of the bankrupt's estate which he had received;

ceived; and the commissioners on the same day made an order, that out of the monies then remaining in his hands, after reserving the aforesaid sums of 529*l.* 14*s.* 3*d.* and 267*l.* 8*s.*, a further dividend should be paid by him on the debts already proved. After payment of that dividend, there were retained in the hands of *Weston* the younger the sums of 538*l.* 10*s.* 10*d.*, to answer claims not substantiated, and 209*l.* 9*s.* 6*d.*, of undivided surplus, in addition to the before-mentioned sums of 529*l.* 14*s.* 3*d.*, and 267*l.* 8*s.*

No further dividend was declared under the commission. *William Weston* the younger died in the month of *April* 1824, and the Defendants *Henry Weston* and *William Cox*, were his personal representatives. After the death of *Weston* the younger, no person was appointed assignee of the estate and effects of the bankrupt, and no further proceedings were taken in the bankruptcy until the 14th of *May* 1834, when *George Green* was appointed official assignee. A notice was subsequently given, that a meeting of the creditors of the bankrupt would be held on the 15th of *July* in the same year, for the purpose of electing a creditors' assignee, but no person attended the proposed meeting, and no creditors' assignee was appointed.

The bill was filed on the 5th of *September* 1834, by the official assignee, against the personal representatives of *William Weston* the father and *William Weston* the son, praying, among other things, an account of all monies and effects, belonging to the bankrupt's estate, received and retained by *William Weston* the father, and *William Weston* the son, respectively, as the assignees of the bankrupt; and that interest might be charged on the balances from time to time in their hands, and that their respective assets might be charged with what should be found due from them respectively on such accounts.

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The cause now came on to be heard.

The *Solicitor-General* and Mr. *James Russell*, for the Plaintiff.

The monies of which the Plaintiff seeks an account are of three kinds. They consist partly of dividends which have been declared, but not claimed; partly, of sums set apart to meet claims which have not been afterwards substantiated; and partly, of undivided surplus. With respect to the two latter, it is impossible to suggest a plausible reason why the account should not be granted as a matter of course. They form now, as they have never ceased to form, part of the bankrupt's estate. In order to give to any other person even an inchoate right to any part of them, some further order of the commissioners was necessary. The undivided surplus was an unappropriated balance, utterly undistinguishable from the rest of the bankrupt's assets, and as such, held by the assignee, and upon his death by the assignee's personal representatives, in trust for the general body of the creditors. It is said that this Court has no jurisdiction to deal with unclaimed dividends in the hands of the representative of a deceased assignee. But upon what principle of morality or equity can such a doctrine be supported? Those dividends were not held by the assignee for his own use. He held them for the specific creditors, subject, however, to the order and disposal of the commissioners. When the assignee died, they continued subject to the same trusts and conditions in the hands of his personal representatives, whose duty it was to pay them over immediately to the new assignee, he being the person whom the law had appointed to administer the trusts.

It follows, as a necessary consequence, that wherever, upon the death of an assignee in bankruptcy such dividends get into the hands of strangers to the commission, the

the new assignee has a right to recover them; and, when recovered, he will hold them upon the trusts and for the purposes to which they were applicable in the hands of his predecessor. This is the equity on which the Plaintiff rests his title to the recovery of the unclaimed dividends; a title wholly independent of any possible question with respect to the relative rights of the different classes of creditors who may have an interest in the distribution of the fund after it shall have been recovered.

So stood the question upon the old law; and all the monies claimed in the present suit came into the hands of the Defendants, as representing the two *Westons*, prior to the passing of the enactments for regulating the disposal of unclaimed dividends. Those enactments materially alter the rights of the parties beneficially interested; but they in no degree affect the title of the Plaintiff, who is here seeking to recover the dividends, in order that he may administer them, under the authority of the Court of Bankruptcy, in the manner directed by the legislature. The law relative to unclaimed dividends was first altered by the 6 *G.* 4. *c.* 16. *s.* 110. (*a*), by which a particular course of proceeding was

(*a*) The sections of the 6 *G.* 4. *c.* 16., and of the 5 & 6 *W.* 4. *c.* 29., upon which the argument principally turned, are the following: —

6 *G.* 4. *c.* 16. Sect. 110. "And be it enacted, that if any assignee under any commission of bankrupt shall have, either in his own hands, or at any banker's, or otherwise subject to his order or disposition, or to his knowledge in the hands of, or in the order and disposition of himself and any co-assignee or co-assignees, or of any or either of them, any unclaimed dividend or dividends, amounting in the whole to the sum of 50*l.*, and shall not, within six months after this act shall have taken effect, or two calendar months after the expiration of one year after the declaration and order of payment of such dividend or dividends made by the commissioners, either pay to the creditor or creditors entitled thereto, or

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was prescribed to the assignee, and a power was vested in the Lord Chancellor, at the expiration of three years from the time when such dividends were declared, to direct

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or cause a certificate thereof to be filed in the office of the Lord Chancellor's secretary of bankrupts, containing a full and true account of the name or names of the creditor or creditors to whom such unclaimed dividend or dividends is or are respectively due, and of the amount of such dividend or dividends respectively (such account being signed by the assignee or assignees rendering the same, and attested by the solicitor to the commission, or the solicitor to the assignee or assignees signing the same), such assignee or assignees shall be charged, in account with the estate of the bankrupt, interest upon such unclaimed dividend or dividends, to be computed from the time that such certificate is hereby directed to be filed, at the rate of *5l.* per centum per annum, for such time as he shall thenceforth retain the same, and also such further sum as the commissioners shall think fit, not exceeding in the whole *20l.* per centum per annum; and the Lord Chancellor, or the said commissioners, may order the investment of any unclaimed dividends in the public funds, or in any government security, for or on account of the creditors entitled, and subject to such order as the Lord Chancellor may think fit to make respecting the same, who, if he shall think fit, may, after the same shall have remained unclaimed for the space of three years from the declaration of such dividends by the commissioners, order the same to be divided amongst and paid to the other creditors, and the proof of the creditors to whom such dividends were allotted, shall from thenceforth be considered as void as to the same, but renewable as to any future dividends, to place them *pari passu* with the other creditors, but not to disturb any dividends which shall have been previously made."

Sect. 111. "And be it enacted, that no action for any dividend shall be brought against the assignees by any creditor who shall have proved under the commission; but if the assignees shall refuse to pay any such dividend, the Lord Chancellor may, on petition, order payment thereof, with interest for the time that it shall have been withheld, and the costs of the application."

*5&6 W.4. c.29.* Sect. *5.* "And whereas, by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled, 'An Act to amend the Laws relating to bankrupts,' it is amongst other things enacted, that the assignees shall file a certificate in the office of

direct them to be divided among the other creditors of the bankrupt. Then came the recent act, the 5 & 6 *W.* 4. *c.* 29., which, it is to be observed, passed into a law

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of the Lord Chancellor's secretary of bankrupts, containing an account of the names of creditors to whom unclaimed dividends are due, and of the amount of such dividends; and power is thereby given for the investment of such dividends; and after the expiration of three years, the Lord Chancellor is empowered to order the same to be divided amongst and paid to the other creditors, in manner therein mentioned; be it enacted, that so much of the said act as directs the filing of the said certificate, and the investment, division, and payment of such unclaimed dividends, be, and the same is hereby repealed."

Sect. 6. "And be it further enacted, that all dividends unclaimed as hereinafter mentioned, and also any undivided surplus of a bankrupt's estate over and above the amount finally directed to be divided amongst the creditors of any bankrupt, shall be paid into the Bank of *England* to the credit of the Accountant-General of the Court of Chancery, or of the Accountant in Bankruptcy, when such last-mentioned officer shall have been appointed, to be carried to an account to be intituled 'The unclaimed Dividend Account,' subject to the order of the Lord High Chancellor, or of the Court of Review in bankruptcy, or of any commissioner of the said Court, for the payment thereout of any dividend or dividends due to any creditor or creditors, and subject also to the order of the Lord Chancellor for the laying out and investment thereof in the purchase of government or parliamentary securities, which securities shall be carried to the before-mentioned account to be intituled 'The bankruptcy fund account,' and shall be subject to such rules and regulations as the said Lord Chancellor shall direct: provided always, that any order of any commissioner for payment of any dividend under the provisions aforesaid, shall be subject to appeal to the said Court of Review."

Sect. 7. "And be it further enacted, that if any assignee under any commission of bankrupt or fiat in bankruptcy now issued or hereafter to be issued shall have, either in his own hands, or at any bankers or otherwise subject to his order or disposition, or shall know that there is or are in the hands, or subject to the order and disposition of himself, and any co-assignee or co-assignees, or of any or either of them, any unclaimed dividend or dividends, amounting in the whole to the sum of 20*l.*, or any such undivided

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law subsequently to the institution of the preser That act repealed the provisions of the 6 *G.* 4. *s.* 110., and introduced an entirely new principle di

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divided surplus as aforesaid amounting to the sum of 20*l.*, such assignee shall, as to any such now existing unclaimed dividend or dividends, within one year after the passing of this act, and as to any future dividend or dividends within three calendar months next after the expiration of one year from the time of the declaration and order of payment of such future dividend or dividends, either pay the same to the creditor or creditors or other the person or persons entitled to the same respectively, or cause a certificate thereof respectively, to be filed in the office of the Lord Chancellor's secretary of bankrupts, containing a full and true account of the name or names of the creditor or creditors to whom such unclaimed dividend or dividends is or are respectively due, and of the amount of such dividend or dividends respectively; and shall in like manner as to any such now existing undivided surplus as aforesaid, within one year after the passing of this act, and as to any such future undivided surplus as aforesaid, within three calendar months next after the expiration of one year after the final declaration of dividends, cause a certificate stating the full and true amount of such surplus to be filed in the office of the said secretary o rupts; and every certifi be filed as aforesaid, s signed by the assignee signees filing the same every assignee who sh cording to the provision act, be bound to file suc ficate as aforesaid, and w make default in filing th shall be charged, in accou the estate of the bankru interest upon the amo such unclaimed divid dividends or undivided as aforesaid, to be co from the time at whic certificate is hereby requ be filed, at the rate of centum per annum, for su as he shall thenceforth, solely or together with assignee or co-assignees, o person or persons, retai dividend or dividends divided surplus, as the ca be, and also with such sum as the Lord Chanc the Court of Review shall not exceeding in the w the rate of 20*l.* per cent annum, to be computed fr time aforesaid; and ev signee shall, within one ye after the filing of any su tificate as aforesaid, pay o to be paid into the B *England*, to the name Accountant-General of th Court of Chancery, or

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disposal of unclaimed dividends, and the undivided surplus remaining after a final dividend. These are to be certified by the assignee to the Secretary of Bankrupts; and, after the lapse of a definite period, are to be paid into the Bank of *England* to the credit of the Accountant-General in bankruptcy, and placed to an account, intituled "The unclaimed dividend account," and the interest of the fund is to be applicable to certain public purposes particularly specified in the act. Even assuming that the provisions of the 5 & 6 *W.* 4. *c.* 29. extend to this case (which clearly they do not), the title of the Plaintiff as assignee to demand and recover these dividends, in order that he may afterwards dispose of them in the mode which the legislature has prescribed, would remain unaffected.

Mr.

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Accountant in Bankruptcy, when such last-mentioned officer shall have been appointed, to be carried to the said account, to be intituled "The unclaimed Dividend Account," the full amount of the unclaimed dividends mentioned in such certificate, or so much thereof as shall not have been then paid to the creditor or creditors, or other person or persons entitled thereto, and also the full amount of such undivided surplus as aforesaid; and if any assignee shall make default in such payment, it shall be lawful for the Lord Chancellor, or the said Court of Review, on petition or otherwise, to order that such sum or sums be forthwith paid into the Bank of *England* in manner aforesaid, together with such further sum to be charged on such assignee or assignees, or other party or parties personally, as to the said Lord Chancellor, or to the said Court may seem fit, not exceeding at and after the rate of, 20*l.* per centum per annum on the sum or sums so withheld, to be computed from the filing of such certificate, up to the time of payment of such sum or sums; and also to make such further order as to costs, as the justice of the case shall seem to require: Provided always, that no such certificate as aforesaid, of any unclaimed dividend or dividends shall be filed until the expiration of one year after the declaration and order for payment of such dividend or dividends.

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Mr. *Wigram* and Mr. *Bethell*, Mr. *Whitmarsh*, Mr *Turner*, and Mr. *Jemmett*, for the different Defendants.

The Plaintiff's demand proceeds on some interest which the bankrupt's estate and the general body o creditors are supposed to have in the unclaimed dividends, and in the sums set apart to answer unsubstantiated claims. But the Plaintiff has in fact nc interest which would enable him to maintain a suit The order declaring a dividend, and directing a sum to be set apart to answer claims, amounted to a complete severance of the funds which were the subject o the order from the rest of the estate; and no one but the particular creditors, for whose benefit the appropriation was made, could afterwards maintain a claim to any portion of them. There is no distinction in this respect between a sum set apart to answer a claim and a sum appropriated for payment of a dividend declared on a debt; the two stand precisely on the same footing being equally considered as the property of the creditor although the money is not immediately payable in the former case. Upon this principle it has been held that where a sum is appropriated, and is in the hands of the assignee to answer a claim, and the assignee fails before the claim has been matured into a proof, the loss must fall on the creditor, and the estate is discharged *Ex parte Grant.* (*a*) The effect of the order of the 2d of *May* 1818 was immediately to convert the assignee into a trustee for the several particular creditors who had proved; and he ceased from that moment to be accountable either to the commissioners or to the creditors at large, in respect of the funds so appropriated. "I think," says Lord *Eldon*, in *Wackerbath* v. *Powell*, "when the order for dividend separates the particular aliquot part to

(*a*) 1 *Mont. & Mac.* 77.

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to be paid to each creditor, from the mass of the personal estate of the bankrupt, that the assignees then become debtors to him." (*a*) The order of dividend is conclusive of the right to payment; *Ex parte Graham* (*b*), *Ex parte Whitwell.* (*c*) That such was the relative position of the creditors and assignee, according to the old law, is manifest from the fact, that prior to the 49 *G.* 3. *c.* 121., the particular creditors might have brought actions for the amount of their respective dividends; *Brown* v. *Bullen* (*d*); and in case of his death, against his representatives: against the latter, indeed, their only remedy was by action or by a suit in equity. (*e*) The twelfth section of the 49 *G.* 3. *c.* 121, the substance of which was re-enacted in the 111th section of the 6 *G.* 4. *c.* 16., first deprived the creditor of this right as against the assignee, and compelled him to apply by petition in the bankruptcy: but the course of proceeding against the executors or administrators of a deceased assignee remained unaltered. The 111th section of the 6 *G.* 4. *c.* 16. applies only to the case of assignees refusing to pay dividends declared, and does not pretend to touch the right of the creditor to bring an action or suit for such dividends against the personal representatives of assignees. The remedy, if taken away at all, could only be taken away by an implication derived from the language of the preceding section, the 110th. That section, however, furnishes no warrant for such an implication: it is in terms confined to assignees themselves: it never mentions or refers to dividends in the hands of their personal representatives; and Lord *Eldon* has decided in *Wackerbath* v. *Powell*, that the executors of an assignee are not within it, so far as relates

(*a*) 2 *Glyn & Jam.* 160.
(*b*) 1 *Rose*, 458.
(*c*) 2 *Rose*, 161.
(*d*) *Dougl.* 407.
(*e*) See *Ex parte Turville*, 1 *Mont. & Ayrt.* 686.

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lates to the penalties thereby imposed. The inference is, that if not within it for one purpose, they cannot be within it for any purpose.

Whether the 110th section of the 6 *G.* 4. *c.* 16. can be construed as giving to the general creditors an interest in the unclaimed dividends, in a case like the present, where the assignees whom these Defendants represent were dead before the passing of the act, is extremely doubtful. The general tendency of the decisions has been to hold that the new provisions in the Bankrupt Act are not to be so construed as to operate retrospectively; more especially as to those sections which are worded similarly to the 110th; *Maggs* v. *Hunt.* (*a*) The following sections have been held not to be retrospective: sect. 73., *Wombwell* v. *Laver* (*b*) sect. 92., *Key* v. *Cook* (*c*); sect. 127., *Carew* v. *Edwards* (*d*); sect. 132., *Ex parte Sammon* (*e*), *Ex parte Phillips.* (*g*) But assuming the operation of the 110th section to be retrospective, still the right to the unclaimed dividends is not thereby absolutely taken away from the particular creditor: the dividends are to remain invested for three years, and, at the end of that period the Lord Chancellor may, at his discretion, make an order for their distribution among the general body of creditors. Until that discretion is exercised, however there can be no right in the general body, and the proof, therefore, remains till then effectual for the specific creditor, and with it the dividend which is the fruit of the proof. Upon this ground it was determined in *Ex parte Renshaw* (*h*), following the decision of Lord *Lyndhurst*

(*a*) 4 *Bingh.* 212.
(*b*) 2 *Sim.* 360.
(*c*) 2 *Mo. & Pay.* 720. *S. C. Nom. Kay* v. *Goodwin*, 6 *Bingh.* 576.
(*d*) 4 *B. & Adol.* 351.
(*e*) *Mont.* 253.
(*g*) 1 *Mont. & Ayrt.* 674., *and* the cases referred to in the note.
(*h*) 4 *Deac. & Ch.* 483.

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*Lyndhurst* in *Ex parte Doxat* (*a*), that the interest accruing on unclaimed dividends which had been invested belonged, not to the general estate of the bankrupt, but to the particular creditors who subsequently came forward and claimed them. That Lord *Eldon*'s opinion was in conformity with these views, appears from his observations in *Wackerbath* v. *Powell*. In the course of his judgment in that case, speaking of a suit to be brought for the unclaimed dividends, against the representatives of a deceased assignee, who had converted the dividends to his own use, his Lordship says, — "Whether, under the circumstances, any suit of this sort could be maintained in a court of equity, without bringing before the Court those particular creditors who were entitled to aliquot shares in the bankrupt's estate, after the dividend was declared, and who, after that dividend was declared, might, prior to the statute, have brought an action themselves against the assignee having that dividend in his hands, or who might, after that act passed, by a petition presented to this Court, have called on him to pay the money to them, — whether this suit in this shape could be maintained at all, — I pass that over, because there is no complaint in the appeal with respect to the manner in which this demand is made."

It has become less material, perhaps, to consider this question, because the 110th section of the 6 *G.* 4. *c.* 16. has been wholly repealed by the 5 & 6 *W.* 4. *c.* 29., the provisions of which, so far as regards the remedy given against assignees, are expressed in the same language. If the former statute, therefore, applied to the present case, so also must the latter. By the latter, the unclaimed dividends, together with the undivided surplus remaining

(*a*) *Nov.* 18. 1830. mentioned in *ex parte Renshaw.*

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remaining after a final dividend, are made applicable to certain public purposes in which the estate of the bankrupt and the parties representing it have no concern. (*a*, Any interest which either the particular creditors, or the general body, might be supposed to have in such dividends and surplus, is completely devested out of them, and is transferred to the public. If the act applies, the title to sue for and recover the dividends for the purposes specified in the act must be in the Attorney-General, and not in the official assignee. In any view of the case, the official assignee cannot be entitled to sue for them. According to the frame of this bill, the claim is asserted, not on behalf of the particular creditors, but for the benefit of the general body; and the rights of the latter, which were only created by the 6 *G.* 4. *c.* 16., were expressly taken away by the late act. If, however, those statutes do not apply, and the claim is considered to be made for the benefit of the particular creditors, those creditors, as the *cestuis que trust* of the fund, ought all to be joined as parties. There may be particular equities affecting the amount of the dividends payable to each. The representatives of the deceased assignees may have it in their power to plead releases, or establish a set-off against some of the particular creditors; they may have a good defence against many, though not against all. Again, each of those creditors has a separate right of action against the Defendants, for the amount of the sum allotted to him as his dividend; and how will that right be precluded by permitting the assignee to recover on behalf of them all? Payment to the Plaintiff will be no defence to such an action, unless it can be shewn that the right of action is gone. Neither would it be any discharge of the covenant which *Weston* the elder entered

(*a*) See *In the Matter of Pocklington*, 2 *Mont. & Ayrt.* 729.

entered into with the commissioners duly to account with them for the benefit of the creditors. Suppose the unclaimed dividends to be paid to the Plaintiff, and he were to become insolvent, would the bankrupt's estate, or the Defendant's, be discharged? Upon whom would the loss fall?

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There is this distinction between the case of *Weston* the father and that of *Weston* the son, that the assets of the former have been long since fully administered, and all the monies in his hands belonging to the bankrupt's estate, with the exception of the 916*l.* 18*s.* 5*d.*, were received by or fully accounted for to *Weston* the son, who in his character of assignee debited himself with the amount, in the account which he rendered to the commissioners. That account was a complete and formal discharge of the father's estate from every thing except the sum of 916*l.* 18*s.* 5*d.*, which, consisting as it did of unclaimed dividends, cannot, for the reasons already urged, be now recovered by the Plaintiff.

*The Solicitor-General*, in reply.

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*The* LORD CHANCELLOR this day delivered judgment as follows: — Dec. 20.

The question in this case, so far as respects the estate of *William Weston* the elder is, whether the Plaintiff, as official assignee, has any such estate or interest in a sum of 916*l.* 18*s.* 5*d.*, which, by an account rendered in the year 1818, appears to have been the amount of dividends not called for, and then in the hands of *William Weston* the elder, the then assignee of the bankrupt's estate, as to entitle him to maintain a bill for that purpose against the personal representatives of that assignee.

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It must be assumed for the purpose of trying the question, that this sum was never paid over to the creditors. No such payment has been proved; but it is said that the Plaintiff, as official assignee of the estate, is not entitled, by a bill, to inquire into the application of the money, or to recover the amount against the estate of the assignee.

I will first consider what is the estate and interest of the official assignee in the property of the bankrupt.

By the 1 & 2 *W.* 4. *c.* 56. *s.* 22., all the personal estate of the bankrupt is to be possessed and received by the official assignee; and by the twenty-fifth section of the same act, all the personal estate, vested in a deceased assignee, vests, by the appointment of a new assignee, in such new assignee without any deed of assignment; so that if the property in question be part of the bankrupt's estate, there can be no doubt of the Plaintiff's estate and interest in such property.

That it was part of the bankrupt's estate is not disputed, and the question is, whether it ceased to be so by the effect of the order (*a*) for a dividend, which in this case was made prior to the year 1803. By such order, it is contended, that *William Weston* the father ceased to hold the sum of 916*l.* 18*s.* 5*d.* in his character of assignee, and became a trustee of it for the several creditors whose debts had been proved, that is to say, for all the creditors.

Now

(*a*) In point of fact, the 916*l.* 18*s.* 5*d.* consisted of unclaimed dividends declared under three several orders of dividend; but the whole sum was treated, throughout, both in the argument and judgment, as arising under one order.

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Now what was the real effect and operation of that order for a dividend? The assignee, from the commencement, held the assets as trustee for all the bankrupt's creditors; but until the debts had been ascertained, it was uncertain who were the parties interested in the trust. When, however, by the proof of debts, the parties interested are supposed to be ascertained, an order is made for dividing what may be in the hands of the assignee, amongst the creditors who have so proved. The property to be divided is the estate of the bankrupt; and it does not appear very obvious how such property can cease to be the estate of the bankrupt, because the state of the proceedings enables the commissioners to ascertain the creditors amongst whom it is to be divided. The trust remains, as before, a trust for all the creditors, although the individuals composing that body are ascertained. An order for a dividend is not an appropriation of any particular part of the bankrupt's estate to any particular creditors, but an order to pay a proportion of all the debts out of the bankrupt's estate, there appearing to be assets for that purpose.

If an executor be ordered to pay a debt or a legacy of his testator, the assets out of which such payment is to be made do not cease to be part of the estate of such testator until the payment is actually made. That an action of *assumpsit* would lie for the dividend, as first decided in *Brown* v. *Bullen* (*a*), cannot disprove this proposition; for it is clear that an order for such payment might have been made under the jurisdiction in bankruptcy; *Ex parte White* (*b*); which would not have been done if, as contended in this case, the assignee, *quoad* the sum out of which the dividend was to be paid, was no longer under that jurisdiction. It is, therefore,

(*a*) *Doug.* 407. (*b*) 1 *Atk.* 91.

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therefore, not material to consider whether the right to recover a dividend in *assumpsit*, first established in the year 1780, and taken away in the year 1809 by the 49 *G.* 3. *c.* 121., was founded upon a true consideration of the situation of the parties. It is also clear that, after a dividend declared, the debt might be expunged, and that as soon as that was done, the amount of the dividend upon such debt would be part of the general estate, and that not by any re-assignment or restoration of a devested title, but continuing a part of that estate from which it had never been separated. (*a*)

What would be the consequence of the doctrine contended for? That the moment a dividend is declared, which may be of the whole estate, the assignee may appropriate all the money to his own use, for which there would be no remedy in bankruptcy; — none but by the individual claims of the particular creditors; and it being contended that sums set apart to answer claims are in the same situation as dividends declared, the same result would follow as to them, although such creditors could not be in a situation to secure the fund.

It is, however, to be ascertained, whether the law as it is to be found in the various acts of parliament upon this subject, does so consider this property, and is so insufficient for its protection.

By the 5 *G.* 2. *c.* 30. *s.* 32., after reciting the evil from monies remaining in the hands of the assignees, whereby they delay the dividing thereof, it is provided that the creditors should direct in what manner the monies arising from the bankrupt's estate should be paid in and remain, until the same should be divided amongst all

(*a*) *Wackerbath* v. *Powell*, 2 *Gl. & J.* 151.; see p. 153.

all the creditors: and by the thirty-third section, after directing the mode of making an order for a dividend, it is provided that the assignee shall forthwith make such dividend and distribution accordingly, and shall take receipts in a book, to be kept for that purpose, from each creditor, which order and receipt is to be a full and effectual discharge to such assignee, for so much as he shall fairly pay pursuant to such order. By Lord *Loughborough*'s order of the 8th of *March* 1794, after reciting that the creditors did not always give directions in pursuance of the above act, it is directed that in such case the assignees should pay all monies amounting to 100*l.*, into the Bank, there to remain until the same should be divided amongst the bankrupt's creditors, and that all assignees should in future covenant to pay the same, conformably to the direction of the creditors, or of that order.

By the 49 *G.* 3. *c.* 121. *s.* 3., the commissioners are directed, in default of any direction by the creditors, to direct how, with whom, and where, the bankrupt's estate shall be paid in and remain until the same shall be divided amongst the creditors. By the seventh section, the commissioners are authorised to direct the investment in exchequer bills, of all monies paid in for the purpose of being divided amongst creditors, or any money retained to answer any claims, or any dividends ordered to be retained by the assignees.

All these provisions consider the whole of the bankrupt's estate received by the assignees, until actually divided and paid to the creditors, as subject to the jurisdiction in bankruptcy; and such was the state of the law in *June* 1818, when *Weston* the elder died, and in *April* 1824, when *Weston* the younger died, each at the time of his death having considerable sums in his hands belonging

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belonging to the bankrupt's estate. Of so much of such monies as had not been what has been called *appropriated* to the payment of dividends, it is not disputed that an account must be taken.

It does not appear that any distinction was made in any of the legislative provisions I have hitherto referred to, between any parts of the bankrupt's estate until actual payment of the dividends. The subsequent enactments are still more specific, in shewing that the sums left in the hands of assignees for the purpose of paying dividends, have always been considered as subject to the jurisdiction in bankruptcy, and subject to be accounted for as such.

By the 6 *G.* 4. *c.* 16. *s.* 110., assignees are to account for all unclaimed dividends; which are to be invested under the direction of the Lord Chancellor, and if not claimed within three years, to be divided amongst the other creditors. It was argued that this section was not retrospective, by which it must have been intended that it did not operate upon the existing commissions; but the enactment is general — if *any assignees under any commission* shall not, within six months after the act comes into operation, or two months after one year from any declaration of dividends, &c. — which must mean six months after the act comes into operation, as to all cases in which orders for dividends had been then made, and the longer period, in all cases in which orders for dividends should afterwards be made.

At the date of this act, in the year 1825, both the *Westons* were dead; but its provisions are important, as shewing, from the 5th of *George* 2. (in 1732) downwards, a regular series of legislative recognitions of the liability of assignees to account, under the jurisdiction in bankruptcy,

ruptcy, for monies out of which they had been ordered to pay dividends, and of such monies being part of the bankrupt's estate until actually paid to the creditors. Whether this particular provision, however, be retrospective or not, does not appear to be of any importance, because that provision is repealed by the 5 & 6 *W.* 4. *c.* 29. *s.* 5.; and by the 6th and 7th sections (which clearly operated upon existing commissions, the 7th section specifying any commission or fiat *now issued* or hereafter to be issued) all unclaimed dividends are to be paid into the Bank, and any assignee who shall make default is to be charged, in account with the bankrupt's estate, with interest upon the amount.

These provisions do not appear to me materially to affect the present question, as they only direct the application of a fund which has, at all times, been considered as part of the bankrupt's estate, and which has been so treated by legislative enactments for above a hundred years; and if it be part of the bankrupt's estate, then, beyond all doubt, it is vested in the assignee, and he is entitled to sue for it.

It appears to me that nothing has raised any doubt upon this subject but the cases which decided that an action would lie for a dividend, and that a creditor neglecting to call for his dividend was to bear the loss of the fund. That the creditor should be so liable is undoubtedly just, as it was his neglect which occasioned the loss; but whether reconcilable or not with the real position of the parties and state of the property, those decisions cannot operate against the conclusion, arising from the considerations I have before observed upon, that, until the dividends are actually paid, all the bankrupt's estate received by the assignees remains part of that estate.

I have

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I have been induced to enter thus fully into the consideration of this case, by the high respect I feel for every suggestion coming from so eminent and learned a Judge as Lord *Eldon*. I must, however, observe that what fell from his lordship in *Wackerbath* v. *Powell* (*a*) was wholly extra-judicial. He desires, indeed, that it may be so considered, and says he only mentions the points to shew that he gave no opinion upon them; but still there is sufficient indication of what was floating in his mind to entitle his observations to great weight. It is highly probable that, if he had found it necessary to give a judgment upon those points, he would, after bestowing that consideration on them which he always did, have had his doubts removed. Be that, however, as it may, after carefully considering those doubts, and all the views and bearings of the subject which the facts and the arguments at the bar have presented to my mind, I am fully satisfied that there is in the Plaintiff such a title to the funds in question as will support the suit he has instituted, and that he is therefore entitled to a decree.

The view I take of the nature and position of the funds in question, considering them as part of the bankrupt's estate, because not actually paid to the creditors, renders it unnecessary for me to make any observation upon the points raised as to the Attorney-General being the proper authority to protect the fund, and as to the necessity of the unpaid creditors being parties. The accounts of the years 1818 and 1821, shewing the amount of monies then in the hands of *Weston* the father and *Weston* the son, the inquiry will be in what manner such sums have been since possessed, paid, applied, or disposed of.

(*a*) 2 *G. & J.* 151.

## NEATE *v.* The Duke of MARLBOROUGH.

1838.
*Jan.* 16, 17. 20.

A judgment creditor, who desires to enforce his security against his debtor's equitable interest in freehold estate by a bill in equity, must previously sue out an *elegit*; and if his bill does not allege that he has done so, it is demurrable.

THIS was a bill filed by a judgment creditor of the Duke of *Marlborough*. After detailing the transactions out of which the debt arose, and the circumstances under which the original security (which consisted of a bond) was given, the bill stated that final judgment was signed on the 25th of *November* 1818. It then went on to allege that the judgment had been duly kept on foot by continuances, and was now in full force, and had not been satisfied, reversed, or vacated; but it did not allege that any *elegit* had been sued out upon the judgment, and in fact no *elegit* had been sued out. It then stated (among other things) the substance of certain deeds dated the 8th of *August* 1818, whereby freehold estates belonging to the Defendant the Duke of *Marlborough*, and of large annual value, were, together with certain leaseholds and other personal chattels, conveyed to and vested in the other Defendant, General *St. John*, upon the trusts therein mentioned; and it alleged that, under those trusts, a sum of 3000*l.* a year was payable to the Duke of *Marlborough*, out of the rents and profits of the property comprised in the deeds.

The bill charged that, by virtue of the trusts, the Duke of *Marlborough* was entitled to an equitable interest in freehold lands to the extent of 3000*l.* a year, or thereabouts, and that, as an unpaid judgment creditor, the Plaintiff had an equitable lien upon that annual sum for the amount of his debt. The bill also contained an allegation that the Duke of *Marlborough* had not now any personal property which was liable to be taken in execution at law; and that unless the Plaintiff

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tiff should be enabled, by the assistance of this Court, to obtain satisfaction of his debt out of the Duke's equitable beneficial interest in the estates and premises comprised in the before-mentioned deeds, he would be wholly without the means of recovering payment of his debt.

The bill prayed that the Plaintiff might be declared entitled to such lien accordingly; that an account might be taken of what was annually coming to the Defendant, the Duke of *Marlborough*, by virtue of the trust-deeds, and that what should be found payable on that account might be applied, by the other Defendant, towards satisfaction of the Plaintiff's debt.

The Defendants filed separate demurrers to the bill, for want of equity; and the Vice-Chancellor having allowed the demurrers, the Plaintiff now appealed.

Mr. *Temple*, and Mr. *Ellison*, for the bill.

Upon the argument of the demurrers in the Court below, several objections were taken, arising upon the frame of the bill and the mode in which the trust for the Duke of *Marlborough* was stated. But they were not relied upon in the judgment, which the Vice-Chancellor rested chiefly, if not solely, on the ground that the bill did not contain an allegation that the Plaintiff had sued out an *elegit* upon his judgment. His Honor considered that a judgment creditor was not entitled to apply for the assistance of a court of equity in order to enforce his security against an equitable estate, unless he had used the utmost diligence to perfect his title at law; and that he was bound, therefore, before he came here, to have issued an *elegit;* and then in his bill to allege that circumstance as a fact essential to his title. His Honor's opinion was founded upon a passage in Lord

*Redesdale's*

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*Redesdale's Treatise* (*a*), where, speaking of a suit by a judgment creditor, his Lordship says, "In any case to procure relief in equity the creditor must shew, by his bill, that he has proceeded at law to the extent necessary to give him a complete title. Thus, in the cases alluded to of an *elegit* and *fieri facias*, he must shew that he has sued out the writs the execution of which is avoided, or the Defendant may demur; but it is not necessary for the Plaintiff to procure returns to those writs." No doubt, Lord *Redesdale*'s proposition is correct with regard to the writ of *fieri facias*: but it is otherwise with respect to the writ of *elegit*, because it is the judgment itself, and not the *elegit*, which gives the lien upon the land; *Stonehewer* v. *Thompson* (*b*). The authorities on which Lord *Redesdale* relies, *Angell* v. *Draper* (*c*) and *Shirley* v. *Watts* (*d*), and others which might be mentioned, such as *Balch* v. *Wastall* (*e*) and *King* v. *Marissal* (*g*), only apply to personal estate; and there the decisions were unquestionably right, for chattels are not bound by the judgment, but only by the writ of execution; *Burdon* v. *Kennedy* (*h*), *Higgins* v. *The York Buildings Company* (*i*), *Payne* v. *Drewe*. (*k*) In Mr. *Raithby*'s note to the case in *Vernon* (*l*), two other cases are mentioned which support the distinction: in *Manningham* v. *Lord Bolingbroke* (*m*) a demurrer, on the ground that no *elegit* had been sued out, was over-ruled; and *Leith* v. *Pope* (*n*) seems to have been to the same effect. No case can be produced in which it has been decided that

(*a*) *Red. Pl.* 126. 4th edit.
(*b*) 2 *Atk.* 440.
(*c*) 1 *Vern.* 399.
(*d*) 3 *Atk.* 200.
(*e*) 1 *P. Wms.* 445.; and see *Cuddon* v. *Hubert*, 7 *Sim.* 485.
(*g*) 3 *Atk.* 192.
(*h*) 3 *Atk.* 739.
(*i*) 2 *Atk*, 107.
(*k*) 4 *East*, 522.
(*l*) 1 *Vern.* 399. note.
(*m*) *East. T.* 1777. 2 *Dick.* 533.
(*n*) 17th *July* 1780. 2 *Dick.* 575.

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that the rule applicable to chattels extends to freehold estate, although, in the argument on the other side, it was assumed to apply equally to both. In an unreported case of *Townshend* v. *Askew* (*a*), the very point arose before Lord *Eldon*. That was a suit by a judgment creditor against his debtor, and against a subsequent incumbrancer of the estates, who had obtained an assignment of a prior term; and the question was, whether, under the circumstances, the term could be set up against the judgment. The bill expressly stated that no *elegit* had been issued. The Vice-Chancellor having made an order for a receiver, the order was afterwards appealed against, and then the objection of the want of an *elegit* was taken. Lord *Eldon* at first entertained some doubt whether an *elegit* might not be necessary; and the matter stood over, to give him an opportunity of consulting Lord *Redesdale* on the point. Eventually, however, his Lordship decided that an *elegit* was unnecessary. This distinctly appears from the note of his Lordship's judgment, taken by Mr. *Heald* on the back of his brief at the hearing. (*b*) Lord *Eldon*, therefore, affirmed the order of the Vice-Chancellor; and afterwards, upon the hearing of the cause, a decree was made for payment of the Plaintiff's debt with costs, out of the rents received by the incumbrancer. That case is an express authority in the Plaintiff's favour. The same doctrine is strongly confirmed by the decision of Lord *Lyndhurst* in *Lord Dillon* v. *Plaskett* (*c*), where, upon

(*a*) *Dec.* 1824.

(*b*) The brief was produced in Court. The note was to this effect:—"I have always considered the *elegit* a mere form, as you could not execute it. Lord *King* said an *elegit* was not necessary; but if you wanted equitable relief as to the personalty, you must take out a *fieri facias*. I have consulted Lord *Redesdale*, and his notion is, that whatever was the old practice, an *elegit* is not necessary, though as to personal estate, a *fieri facias* is."

(*c*) 2 *Bligh*, 239. *N. S.*

upon a bill by judgment creditors, claiming to be entitled to a moiety of a rent-charge issuing out of three counties in *Ireland*, his Lordship held it was no objection to their claim that they had sued out only one *elegit*.

It is admitted that an *elegit* need not be returned; *Lord Dillon* v. *Plaskett* (*a*): and yet, if, in order to give him a *locus standi*, the Plaintiff is bound to shew that he has used the utmost diligence at law, there ought, for the same reason, to be a previous return to the writ. What would be the use of requiring that an *elegit* should have issued? It would only be an idle and expensive form. The very object of the creditor in coming here is to obtain the same benefit against the equitable estate, as the *elegit* would have given him at law. The Court, however, when it once assumes the jurisdiction in these cases, does not act merely as auxiliary to the writ; but it takes upon itself to administer justice to the creditor through the medium of its own independent powers. In *Foster* v. *Blackstone* (*b*) and in *Lewis* v. *Lord Zouche* (*c*), the right of a judgment creditor to have his debt paid out of the debtor's equitable interest in lands, was not disputed. This bill, therefore, does not ask a moiety of the rents only; but it prays that the amount of the Plaintiff's debt may be satisfied out of the debtor's equitable estate in the hands of his trustee.

Mr. *Jacob*, Mr. *Wray*, and Mr. *Richards*, for the demurrers.

One question upon these demurrers is, whether the Plaintiff has sufficiently stated his title in his bill. Another

(*a*) 2 *Bligh*, 239. *N. S.*
(*b*) 1 *Mylne & Keen*, 207.
(*c*) 2 *Sim.* 388.

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Another is, whether he has taken a step, which, according to every printed case where the point has been considered, has been held to be indispensable in order to entitle him to apply to this Court at all. Upon the latter, which is the more material question, the high authority of Lord *Redesdale*, in the passage already quoted, is express and decisive. Probably there is some mistake in the note which has been produced of Lord *Eldon*'s judgment in *Townshend* v. *Askew*, purporting to give the opinion of Lord *Redesdale;* and at all events, even if correctly given, it can have little weight against the deliberate statement of the rule contained in the *Treatise on Pleading*. The fourth edition of that work (as appears from the preface) was revised by the author himself, and although it was published some years subsequently to the date of Lord *Eldon*'s order in *Townshend* v. *Askew*, it states the rule in the very same terms as the third edition had done. The inference is unavoidable, either that the manuscript note of *Townshend* v. *Askew* is erroneous, or that Lord *Redesdale*, on reconsideration, saw reason to adhere to his original opinion. In *Townshend* v. *Askew* the contest was not between the creditor and the debtor, but between two competing incumbrancers, each claiming priority: and it is a not immaterial circumstance, that after the bill in that case had been filed, and the objection of the want of the *elegit* had been taken, the Plaintiff, having some misgivings as to the correctness of his course, actually sued out an *elegit*. In *Davidson* v. *Foley* (*a*) the necessity for issuing the writ, as the foundation of the title to sue, is taken for granted. That the rule has always been so understood and acted upon, is clear from the course which was taken by the Plaintiffs in the several cases of *Bennet* v. *Musgrove* (*b*), *Rowe* v. *Bant*,

(*a*) 2 *Bro. C. C.* 203. (*b*) 2 *Ves.* sen. 51.

*Bant* (*a*), *Stephens* v. *Olive* (*b*), *Mountford* v. *Taylor* (*c*), *Lewis* v. *Lord Zouche* (*d*), *Cocker* v. *Lord Egmont.* (*e*) In *Curling* v. *Marquis Townshend* (*g*), which came before Lord *Eldon* upon an application for a receiver by a judgment creditor who had sued out an *elegit*, his Lordship considered that the having taken out execution was a material circumstance in the creditor's title. Even in the case of *Lord Dillon* v. *Plaskett*, which has been cited for the Plaintiff, the House of Lords recognised the necessity of there being an *elegit*, though under the circumstances, it was considered that the exigency of the rule had been sufficiently complied with in that case.

Independently, however, of authorities, there is abundant reason on principle for requiring the rule to be observed. Whenever, as in the present case, a court of equity is called upon to assist the proceedings in another court, and to enable a party to make effectual here a right which he has acquired in such other court, he ought to come forward with the best possible proof that, in the court from which he comes, he stands in the situation of being at once entitled to the right which he claims; and such proof is furnished by his being in the condition to sustain an *elegit*. There are judgments in which the party obtaining them has not the right to sue out immediate execution; — judgments against assets *quando acciderint*, judgments with stay of execution, judgments against a party *quâ* heir or executor, &c.; but the actually having sued out the writ is conclusive proof that the judgment is one upon which the party is entitled to immediate execution. Besides, the right of the judgment creditor to the rents begins to

(*a*) 1 *Dick.* 150.
(*b*) 2 *Bro. C. C.* 90.
(*c*) 6 *Ves.* 788.
(*d*) 2 *Sim.* 388.
(*e*) 6 *Sim.* 311.; and see *Tunstall* v. *Trappes*, *Lawson's Case*, 3 *Sim.* 286.
(*g*) 19 *Ves.* 628. See p. 652.

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to run only from the time when the *elegit* issues. That fixes the moment from which his right attaches as against all other persons claiming interest in the lands; and his right of immediate enjoyment then first accrues.

It is also observed by Sir *Edward Sugden*, in his treatise on *Vendors and Purchasers* (*a*), that by the 10th section of the Statute [of Frauds (*b*)] "it is enacted that execution may be delivered upon any judgment, statute, or recognisance of all such lands, &c. as any other person or persons shall be seised or possessed of in trust for him against whom execution is so sued, in the same manner as if he had been seised of such lands, &c. of such estate as they be seised of in trust for him *at the time of the execution sued*, and shall be held discharged of the incumbrances of the trustee. Upon the construction of this statute, it hath been holden that if a trustee has conveyed the lands before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution." In this view, therefore, the time when the writ is sued out comes to be very material; for it is of the very essence of the act of parliament, as against trust estates, that the lien should be created by the fact of issuing execution. Mr. *Tidd*, in his work on *Practice* (*c*), says, that an *elegit* must be first sued out, though it does not seem necessary that it should be returned. This is done in order to constitute a lien, for no lien is created upon the land by judgment without execution. The doctrine laid down in the cases already cited, and also in the passage of Lord *Redesdale*, which is quite express, is founded upon these principles, and is in strict conformity with them.

Mr. *Temple*, in reply.

*The*

(*a*) Vol. i. p. 542. 9th ed.
(*b*) 29 *C.* 2. *c.* 3.
(*c*) p. 1036. 9th ed.

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*The* LORD CHANCELLOR.

This appeal having been partly argued yesterday, I have had an opportunity of looking into the authorities that were then referred to, and also several others bearing upon the same point; and certainly, if it had not been for the case reported in *Dickens*, I should not have felt the slightest doubt upon the subject. Before finally disposing of the appeal, I will have that case examined.

In the first place, I find Lord *Redesdale* not only laying it down that it is necessary that the judgment creditor suing in this Court should have issued an *elegit*, but expressly saying, that if that is not done, it is a ground of demurrer. And there was great force in the argument at the bar, that, though his Lordship's attention had been distinctly called to the point, yet when a subsequent edition of his *Treatise on Pleading* was published, and, as I have always understood, under his superintendence, the same passage was preserved. I also find Lord *Lyndhurst* stating it as a general rule, though that was not the point on which the decision of the appeal before him was to turn, that an *elegit* is necessary. For myself, I never entertained the least doubt of it; and certainly, though I have not had particular occasion to look into the question, if I had been asked what the rule of the Court was, I should at once have answered that, when a party comes here as a judgment creditor for the purpose of having the benefit of his judgment, he must have sued out execution upon the judgment. And in all the authorities referred to, though in some of them the distinction appears to be so far taken that, in the case of a *fieri facias*, the creditor must go the whole length of having a return, there is no case, except the solitary one in *Dickens*, which decides that the suing out of the *elegit* is not necessary as a preliminary step.

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With respect to authority, therefore, there can be no doubt; for there is not only the authority of Lord *Redesdale*, and that of Lord *Lyndhurst*, in the House of Lords, but there is also what is stated, at the bar, to be the uniform understanding and practice of the profession.

The conclusion at which I arrive, however, as to what on principle ought to be the rule, is derived from a consideration of the nature of the jurisdiction which the Court exercises in such cases. That jurisdiction is not for the purpose of giving effect to a lien which is supposed to be created by the judgment. It is true that, for certain purposes, the Court recognises a title by the judgment, — as for the purpose of redeeming, or, after the death of the debtor, of having his assets administered; — but the jurisdiction there is grounded simply upon this, that inasmuch as the Court finds the creditor in a condition to acquire a power over the estate, by suing out the writ, it does what it does in all similar cases; it gives to the party the right to come in and redeem other incumbrancers upon the property. So again, after the debtor is dead, if, under any circumstances, the estate is to be sold, the Court pays off the judgment creditor, because it cannot otherwise make a title to the estate; and the Court never sells the interest of a debtor subject to an *elegit* creditor. That was very much discussed in the case of *Tunstall* v. *Trappes*. (*a*) But there was there a necessity for a sale; and the question was not as to the right of the judgment creditor against his debtor, he being willing; but where, from other circumstances, a sale having become indispensable, it was necessary to clear the estate from the claims of parties who had charges upon it.

It

(*a*) 3 *Sim.* 286.

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It is, therefore, not correct to say that, according to the usual acceptation of the term, the creditor obtains a lien by virtue of his judgment. If he had an equitable lien, he would have a right to come here to have the estate sold; but he has no such right. What gives a judgment creditor a right against the estate is only the act of parliament (*a*); for independently of that, he has none? The act of parliament gives him, if he pleases, an option by the writ of *elegit* — the very name implying that it is an option — which, if he exercises, he is entitled to have a writ directed to the sheriff to put him in possession of a moiety of the lands. The effect of the proceeding under the writ is to give to the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into this Court, not to obtain a greater benefit than the law, that is, the act of parliament, has given him, but to have the same benefit, by the process of this Court, which he would have had at law, if no legal impediment had intervened. How then can there be a better right; or how can the judgment, which, *per se*, gives the creditor no title against the land, be considered as giving him a title here? Suppose he never sues out the writ, and never, therefore, exercises his option, is this Court to give him the benefit of a lien to which he has never chosen to assert his right? The reasoning would seem very strong, that as this Court is lending its aid to the legal right (and Lord *Redesdale* expressly puts it under that head, namely, the right to recover in ejectment), the party must have previously armed himself with that which constitutes his legal right; and that which constitutes the legal right is the writ. This Court, in fact, is doing neither more nor less than giving him what the act of parliament and an ejectment

(*a*) 13 *Ed.* 1. *c.* 18.

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ejectment would, under other circumstances, have given him at law.

The circumstance of the question not having been always raised, may, in part, account for the obscurity to be found in some of the cases where the subject has been discussed; but when we consider the nature of the jurisdiction which is exercised by the Court in suits by judgment creditors, the obscurity vanishes. The sole reason for coming into this Court being founded on a right which the writ of *elegit* confers, the creditor cannot come, without having obtained that right. I am unwilling, however, finally to dispose of the question until I have ascertained the circumstances of the case reported by Mr. *Dickens*, for I should wish to know whether I am or am not acting against the authority of a decision of Lord *Bathurst*.

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*Jan.* 20.

*The* LORD CHANCELLOR.

I have already stated the principles which ought, in my opinion, to regulate the judgment in this case. The question was, whether, upon a bill by a judgment creditor, seeking the aid of this Court against his debtor's land, it was, or was not, necessary to allege on the face of the bill that the creditor had sued out an *elegit*, all principle and all authority (with the exception of a single case) appearing to shew that it was necessary, inasmuch as the Plaintiff's title depended upon it.

The one case of alleged exception came before Lord *Eldon*, upon an application for a receiver. It was alleged, that a suggestion having been made on that occasion, that the judgment creditor ought to have sued out the writ, his Lordship said he would consult, and accordingly did

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did consult, Lord *Redesdale;* and subsequently stated, as the result of the conference, that although such had formerly been the rule, it was now considered a mere form. That statement comes to me in a shape which would not justify me in paying very great attention to it — in the shape of a note made by counsel on the back of his brief, at the hearing of the cause: while in opposition to it, and from the very same note it appears that the Plaintiff in the cause, distrusting the propriety of his course, had actually sued out the writ before the hearing; a proceeding not very consistent or reconcilable with the opinion ascribed to Lord *Eldon.*

On the other hand, looking to Lord *Redesdale's* authority, I find in a subsequent edition of his *Treatise on Pleading* (which was published under his Lordship's sanction), not only the very same statement as was contained in the previous edition upon this point, but also a reference to a case, to be presently adverted to, of *Manningham* v. *Lord Bolingbroke*, which, after the proposition, that it is necessary to allege that the writ has been sued out, is cited for the purpose of shewing that it is not necessary to allege the return. I cannot, therefore, believe that Lord *Redesdale*, if he ever was consulted by Lord *Eldon* on the point, could have given his opinion that the *elegit* was not necessary.

Another case was also referred to in support of the same doctrine, the case of *Manningham* v. *Lord Bolingbroke.* (*a*) As reported in *Dickens*, it is stated to be a case in which a bill having been filed by a judgment creditor before he had sued out the writ, a demurrer was put in upon that ground, and was overruled by Lord *Bathurst*, thereby in effect deciding that the suit should proceed

(*a*) 2 *Dick.* 533.

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proceed notwithstanding the defect. If that had really been the decision of Lord *Bathurst*, having now stood for upwards of sixty years, it would be entitled to the greatest possible weight. I had so little faith, however, in the report, that I desired the Registrar to search the records of the Court for the case, and I have now been furnished with an extract from the demurrer. The demurrer was filed on the 8th of *April* 1777, and was as follows: —

"For cause of demurrer sheweth that in and by the said complainant's bill, it appears by the said complainant's own shewing, that although the said complainant caused writs of *fieri facias*, directed to the sheriff of the county of *Middlesex*, to be issued on the judgment in the bill mentioned, against the goods and chattels of this Defendant, it is not stated in the said bill, that the said sheriff returned *nulla bona* to the said writs, or either of them, and that the said complainant could not have had satisfaction out of this Defendant's personal estate: And this Defendant, for cause of demurrer, further sheweth, that although the said complainant hath, in and by his said bill, set forth that he caused writs of *elegit*, directed to the sheriffs of the counties of *Wilts*, *Kent*, and *Berks*, respectively, to be issued upon the said respective judgments against this Defendant, in order to extend his lands, tenements, and hereditaments in the said counties, for payment of the debts in the said bill mentioned, it is not stated in and by the said bill, that the said sheriff made any return to the said writs of *elegit*, finding that this Defendant was seised of the said lands, tenements, and hereditaments, any or either of them, to entitle the said complainant to extend the same; nor is it stated, by the said complainant's bill, that this Defendant has no other lands whereof

whereof the said complainant might extend the moiety for satisfaction of the said debts: Wherefore," &c.

Another case was referred to from the note in Mr. *Raithby's* edition of *Vernon*, I mean *Leith* v. *Pope*, which is likewise briefly mentioned in *Dickens*. (*a*) There, however, as appears from an inspection of the demurrer, with an extract of which the Registrar has supplied me, the point with respect to the suing out of the *elegit* did not arise at all. The demurrer in the case of *Manningham* v. *Lord Bolingbroke* did, indeed, refer to it; for it insisted that the writ had not been returned, as a ground of demurrer, the bill stating that the writ had issued. The proposition, therefore, raised by that demurrer, assumed what has always been considered as the rule of this Court, that the bill must first allege the issuing of the writ, and the case must be classed with the others, which shew that such a step has been considered necessary. It is obvious also that Lord *Redesdale*, from the mode in which he cites it as an authority, must have had correct information as to what was the real effect of the decision, viz. that it is necessary to allege that the writ has been sued out, but not, that it has been returned.

I have therefore no hesitation in saying, that I entirely concur in the Vice-Chancellor's judgment. The appeal must be dismissed, and I cannot give the plaintiff leave to amend. (*b*)

(*a*) 2 *Dick.* 575.

(*b*) The rights and remedies of judgment creditors have been very materially altered and extended by the late act for abolishing arrest on mesne process, 1 & 2 *Vict. c.* 110. See especially the 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, and 19th sections of that act.

1838.

June 5.

## TAYLOR v. SALMON.

A document which was admitted by a Defendant's answer to be in his possession, and was included in a schedule to the answer, was left with his Clerk-in-Court under the usual order; and the Plaintiff then proved it in the cause, and proved that it came out of the custody of the Defendant's Clerk-in-Court. Held, that the circumstances did not oblige the Plaintiff to read that part of the answer which admitted the document to be in the Defendant's possession.

THE Defendant *Salmon*, by his answer, admitted the possession of certain documents, stated in a schedule, which comprised, among other papers, a letter dated the —— day of ——, and signed "*Dunally*." The usual order for leaving the documents with the Defendant's clerk-in-Court was made. To prove that this letter had passed between Lord *Dunally* and the Defendant, the Plaintiff, at the hearing of the cause, exhibited the order for production, and proved, by the evidence of a witness, that the letter was produced out of the custody of the Defendant's Clerk-in-Court, and further proved it to be in the handwriting of Lord *Dunally*.

*The Solicitor-General* objected that the Plaintiff could not read the letter, without first reading that part of the answer which admitted it to be in the Defendant's possession, because it might appear that the answer contained statements which qualified the effect of the letter, or even shewed that the paper purporting to be a letter, was not really a letter.

Mr. *Wigram*, *contrà*, said that the order for production traced the letter from the possession of the Defendant to the hands of his Clerk-in-Court; and that this, with the deposition shewing that it came from his Clerk-in-Court, and the proof of the handwriting, was evidence of the letter having passed, independently of any statement in the answer.

*The*

*The* LORD CHANCELLOR.

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If the Plaintiff had called the Defendant's Clerk-in-Court to prove that he had received the letter from the Defendant, coupled with the other evidence given, it would clearly be enough. The evidence offered amounts, in fact, to this. The letter is admissible without reading the answer.

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## MADDEFORD *v.* AUSTWICK.

*July* 27, 28.

The Court has no authority under the 2 *G.* 2. *c.* 23. to make an order against the personal representatives of a deceased solicitor, that the solicitor's bills of costs shall be taxed.

BY an order of the Vice-Chancellor, dated the 2d of *May* 1838, and made upon the petition of the Plaintiff's executors, the Master was directed to tax the bills of costs of *Richard Woodhouse* deceased, and of the firm of *Richard Woodhouse* and *Thomas Eyre Weston*, of the firm of *Richard Woodhouse* and *George Woodhouse*, and of *George Woodhouse*, delivered to the Plaintiff; and, except as to the said *Richard Woodhouse*, if it should appear that the said bills, or any of them, were overpaid, then it was ordered that *Francis Valentine Woodhouse*, and the said *George Woodhouse*, as the executors of the said *Richard Woodhouse*, and the said *Thomas Eyre Weston*, and the said *George Woodhouse*, for himself, and as the surviving partner of the said late firm of *Richard Woodhouse* and *George Woodhouse*, respectively, should pay and refund to the petitioners what should appear to have been so overpaid.

The executors of *Richard Woodhouse* appealed against this order.

*Richard Woodhouse*, it appeared, had been an attorney and solicitor, who was for many years employed by

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by the Plaintiff, in that capacity, in the conduct of his affairs. Five of the bills of costs comprised in the Vice-Chancellor's order were for professional business done, on the Plaintiff's behalf, by *Richard Woodhouse* alone; and those bills were, in the years 1823, 1824, 1825, 1826, and 1828, respectively, delivered by *Richard Woodhouse* to the Plaintiff, by whom they were all paid, to the amount, in the whole, of 1299*l.* 3*s.* 6*d.* Subsequently to the delivery and payment of those bills, *Richard Woodhouse* entered into partnership with *Thomas Eyre Weston*, and after his (*Weston's*) retirement, with *George Woodhouse*. The Plaintiff continued to employ the successive firms in the conduct of his professional business until the death of *Richard Woodhouse*, which happened in the month of *August* 1834. After that period he for some time employed *George Woodhouse* as his attorney and solicitor; and the remaining bills of costs, referred to in the order, were bills of costs incurred by the Plaintiff in respect of such business, during the continuance of the successive partnerships, and after the death of *Richard Woodhouse*.

Mr. *Wigram* and Mr. *Wright*, for the appeal.

The order, in so far as it directs a taxation against the executors of *Richard Woodhouse*, cannot be supported. The bills of costs for business done by *Richard Woodhouse*, when he carried on the business of a solicitor by himself, have all been settled, and no such grossly erroneous or improper charges in them as amount to evidence of fraud are shewn or alleged. Upon the principle adopted by your Lordship in *Harlock* v. *Smith* (*a*), therefore, no sufficient ground has been laid for taxing them now. There is also another objection which is fatal. The order directs a taxation against the executors of *Richard Woodhouse*. The statute

(*a*) 2 *Mylne & Craig*, 495.

tute (*a*) under which orders are made upon petition for the taxation of bills of costs, gives no authority to the Court to direct the bills of costs of a deceased attorney or solicitor to be taxed. It would be singular, indeed, if it did; for the effect of such an order, wherever the the attorney or solicitor had been over-paid (when his estate would of course have to refund), would be to give to the party obtaining the taxation an immediate and summary remedy against his debtor's estate to the prejudice of other, and it might be, preferable creditors. Against an order for payment of the balance found due upon taxation, the personal representatives of the debtor would have no defence: and yet there might be other claims of a higher nature, which, if the assets were duly administered, would exhaust the estate, and leave nothing to answer the client's demand. It would be absurd to suppose that this Court has the power to order the taxation, without being able to follow up that order by directing the balance found due to be forthwith paid. The statute is, in terms, confined to attorneys and solicitors; and no reason can be assigned why it should be extended by implication to their personal representatives. On the contrary, it has been repeatedly decided that the executors or administrators of an attorney or solicitor are not within the penal provision in the twenty-third section, by which the costs of the taxation are to be borne by the attorney or solicitor, if more than one sixth of the amount of the bill has been struck off; *Weston* v. *Pool* (*b*), *In re Cole.* (*c*) And the same rule has been adopted in the case of assignees, and for the same reason; *Willasey* v. *Mashiter* (*d*), *Alsop* v. *Lord Oxford.* (*e*) If executors are not within the statute

(*a*) 2 *G.* 2. *c.* 23. *s.* 23.
(*b*) 2 *Stra.* 1056.
(*c*) 2 *Sim. & Stu.* 463.
(*d*) 3 *Mylne & Keen*, 293.
(*e*) 1 *Mylne & Craig*, 26.

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tute for one purpose, they cannot be within it for any purpose, the remedy thereby given against the attorney or solicitor being strictly personal. (*a*)

*The* LORD CHANCELLOR requested the Respondent's counsel to confine himself to the second objection.

Mr. *Temple*, in support of the order.

Upon the argument of the petition in the Court below, his Honor considered that the point now relied upon was necessarily involved in your Lordship's decision in the case of *Waters* v. *Taylor* (*b*). The petition of *Henry Winchester*, in that case, was a petition against the executor of a deceased solicitor, praying that the solicitor's bills of costs might be taxed; and your Lordship there felt no difficulty in directing taxation of such of the bills of costs as had been incurred subsequently to the time of a settlement of accounts between the solicitor and the client, although you refused it as to the others. In *Redfearn* v. *Sowerby* (*c*), Lord *Eldon* appears to have considered that the summary jurisdiction of the Court extends to the representatives of a solicitor; and such certainly has been the general opinion of the profession, for in none of the numerous instances which have occurred of petitions praying that the bills of costs of deceased solicitors might be taxed, has it ever, until the present case, been suggested that the Court had no authority to grant the application. Even the exception with respect to the costs of the taxation, established in favour of the personal representatives of

(*a*) See Lord *Eldon*'s observations on the 110th section of the 6 *G.* 4. *c.* 16., in *Wackerbath* v. *Powell*, 2 *Gl. & J.* 151. and the argument in *Green* v. *Weston*, p. 395. *suprà*.

(*b*) 2 *Mylne & Craig*, 526.

(*c*) 1 *Swan.* 84.

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of solicitors, in the cases of *Weston* v. *Pool* and *In re Cole*, proves that, for every other purpose, the representatives are considered to be within the equity of the twenty-third section. There is great convenience to the suitors in giving them the summary remedy, provided by that section, against the personal representatives of deceased solicitors, instead of compelling them to wait until a demand has been actually made, and the amount tendered, before they can call for a taxation. And if the order is guarded, as his Honor has here guarded it, (for there is a special exception in it as to *Richard Woodhouse*,) so as to prevent the danger of sanctioning a *devastavit* on the part of the executors, in case a balance should be found against the estate of the deceased solicitor, no possible injury can be done.

*The* LORD CHANCELLOR.

What is the use of a jurisdiction to tax, as against the representatives of a solicitor, if there is no power to compel payment? Such a jurisdiction would be perfectly nugatory, because, if the client comes in as a creditor, he must institute a suit for that purpose, and the Court will not let him recover without having the state of the assets ascertained, as well as having the claim investigated. Sir *John Leach* has expressly decided, that the penal provision in the twenty-third section of the act does not apply in the case of the executor or administrator, or the assignees of a solicitor. Besides, I do not see how it is possible to work out the summary remedy, given by this order, in such a manner as to be consistent with the rights of other creditors.

The question is a very important one, and it seems singular that it should not have been raised before. It was not necessary to consider it, and in fact it was not

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raised, in *Waters* v. *Taylor*, the party who there appealed asking relief upon that point. The order complained of must be discharged.

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*Jan.* *Nov.* 7.

## CROSLEY *v.* The DERBY Gas-Light Company.

Practical difficulties in working out a decree directing an account of the profits made by the piratical use of an invention to which the Plaintiff had an exclusive right.

THE bill in this cause, after stating the Plaintiff's title to a patent for making gas-meters, and alleging that the Defendants had made gas-meters, which were infringements on the patent, and had used them in carrying on their works, or had sold and disposed of them for profit, prayed that the Defendants might account for all such meters so sold and disposed of, or used, and for the full value thereof, or other profit of the sales, or other disposition or use thereof. By the decree, an account was directed of what profits had been received, and what benefit derived from the use of such gas-meters as were made and manufactured during the existence of the letters patent, from six years previous to filing the bill and down to the date of the decree, and it was ordered that the Defendants should pay to the Plaintiff what should be found due upon taking such account.

The Master, by his report, "found and certified that a benefit had been obtained by the Defendants, by the use of meters, in saving gas, equal to 2*s.* 6*d.* for every 1000 cubic feet of gas, equivalent to profit, and thereby enabling the company to sell at 10*s.*, and that 25 per cent. had been saved by the use of meters; and appeared by the books of the company, that the Defendant

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Defendants, by hand bills printed and delivered to customers in *July* 1821, determined that meters should be furnished free of expense, and that the company hoped to be able to furnish gas permanently to those who used meters at 7*s.* 6*d.* per 1000 cubic feet: And it also appeared that the company, on the 8th of *May* 1822, made an order that all persons having more than one light, or having but one light which was not publicly exposed, should give notice of their intention to receive a gas-meter ten days before *Midsummer* day then next, and in case of their omitting to give such notice, the pipe of communication would be cut off: And upon the whole consideration of the several states of facts, and the evidence so laid before him, the Master allowed and found that the benefit, including profit received, derived by the Defendants from the use of such gas-meters as were made and manufactured during the existence of the letters patent, from six years previous to filing the Plaintiff's bill, down to the date of the decree, amounted to the sum of 6000*l.*"

To this report the Defendants took several exceptions, which came on for argument before the Master of the Rolls on the 6th of *May* 1837, when his Lordship made an order referring it back to the Master to review his report; with a direction that he should state to the Court the grounds upon which he came to the conclusion which he might arrive at.

The Plaintiff appealed against that order.

Mr. *Wigram*, Mr. *Cooper*, and Mr. *Bethell*, in support of the appeal.

The *Solicitor General*, Mr. *Rotch*, and Mr. *Bacon*, *contrà*.

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The material questions which were raised by the exceptions, and the principal arguments on both sides, are stated and considered in the judgment.

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*Nov.* 7. *The* LORD CHANCELLOR, after briefly stating the objects of the bill and the substance of the decree, gave judgment as follows: —

This decree was pronounced by the Vice-Chancellor in *March* 1834, and was, upon appeal, affirmed by Lord *Brougham* (*a*); and the only duty of the Court, upon the exceptions to the Master's report, now before me upon appeal from the order of the Master of the Rolls, is to put a construction upon the decree, and decide whether the Master has properly taken the account referred to him by the decree.

The Master of the Rolls appears to have stated that he was unable to ascertain the grounds upon which the Master had reported the sum of 6000*l.* as the result of the account; and referred it back to the Master to review his report, and to state the grounds upon which he came to the conclusion he might arrive at — not to state the grounds of the report already made. There is no ground, therefore, the difficulty urged at the bar in support of the appeal, that, as the reference cannot be made to the same Master, some variation in the order of the Master of the Rolls was, at all events, necessary.

If the Master of the Rolls is to be taken to mean that he did not understand how the evidence stated in the report could have led the Master to the conclusion

(*a*) The judgment of Lord *Brougham* upon the appeal is reported in 4 *Myine & Keen*, 72.

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clusion to which he came, I entirely concur in that opinion; but it appears to me that the grounds upon which the Master proceeded do appear upon the report, and that they do not support the conclusion. He states that he found from the evidence that benefit, equivalent to profit, and equal to 2*s.* 6*d.* upon every 1000 cubic feet, had been obtained by the use of the meters, and that 25 per cent. had been saved by the use of the meters. He then states the particular grounds of this conclusion, which are, hand-bills circulated by the company in 1821, intimating the company's intention of furnishing meters free of expense, and that the company hoped to be able to furnish gas permanently to those who used meters, at 7*s.* 6*d.* per 1000 cubic feet, the price to those who did not use meters being 10*s.*, — also an order of 1822, by which certain persons were not to be served with gas unless they used meters; and he then reports 6000*l.* to be the result of the account, a sum which appears to have been produced by calculating 2*s.* 6*d.* upon each 1000 cubic feet of gas supplied, rejecting, however, some hundreds of pounds, which, if the principle were correct, ought to have been added to the 6000*l.*

It is obvious that a suggestion, never acted upon, that the company might at some future time supply gas to those who used meters, at 2*s.* 6*d.* per 1000 cubic feet less than to those who did not, can be no ground for estimating the profit actually derived from the use of them. But there was another statement of the company in evidence which was much relied upon; namely, that not more than three fifths of the gas made was paid for. This was a vague statement, not to be relied upon in executing a decree directing an account of profit to be taken.

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The grounds, however, upon which the Master proceeded, and upon which it was attempted to support his report were these: — the company charge 10*s.* per 1000 cubic feet; the quantity supplied is calculated by the ascertained consumption of a certain number of burners in a given time; and if the burners were always in a proper state, and the time were never exceeded, all the gas supplied would be paid for. But that is not the case; frauds are practised by altering the burners, and exceeding the stipulated time, so that it is found that, instead of 1000 cubic feet being consumed in the given time, a much larger consumption takes place, equal to one fourth more; that is, 1250 cubic feet are consumed instead of 1000; but as the company charge 10*s.* per 1000 feet, that is 2*s.* 6*d.* for every 250 cubic feet, the loss of the 250, that is, of the difference between the 1250 and the 1000, is worth 2*s.* 6*d.*; and as by the use of the meter these frauds are prevented, the company save 250 cubic feet upon every 1000 cubic feet, which is equivalent to 2*s.* 6*d.* for every 1000 cubic feet.

Now, assuming these figures to be correct—and if the principle followed be not just, there is no necessity for inquiring whether they are so or not—the calculation proceeds upon the supposition that 2*s.* 6*d.* is the value to the company of 250 cubic feet of gas; whereas it appears that the company have been supplying, not 1000 cubic feet, as calculated, but 1250 cubic feet for 10*s.*: — nay much more, for it is admitted that 10 per cent. is lost under either system before the gas comes to the consumer's premises, so that 1375 must be made for every 1000 paid for; and if their proposal of charging 7*s.* 6*d.* only be used as evidence against them, it would shew the value of the 1000, or rather 1100 cubic feet to be 7*s.* 6*d.*, and not 10*s.*

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The whole principle of the calculation appears to me to be founded in error. The supposed profit is in fact a protection against a loss. The sum charged for any quantity of gas supplied, must not only cover all the expenses of the establishment, machinery, materials, labour, and interest of capital, but also the profit of the company. The actual loss sustained in making 250 cubic feet over and above the 1000, cannot, however, be measured by a proportional part of these charges and outgoings. By far the greater part of these would be the same though 1000 only were produced. After printing 1000 copies of a newspaper, the expense, to the proprietor, of printing 250 more will very little exceed the value of the paper and labour employed, and if we suppose some defect in the machinery for printing, in consequence of which 250 copies out of every 1250 are rendered unfit for use, would not the loss consist in the paper and other materials, and the labour employed in printing the 250 useless copies? — would it be reasonable to calculate the loss at one fourth part of the price for which the 1000 good copies were sold? By the same rule, if the company were repaid the value of the materials actually consumed in producing the additional 250 cubic feet, and of the additional labour paid for, with a due allowance for the additional wear of the machinery employed, their loss would be repaid to them. The Master, by the course he has adopted, has not only charged upon these 250 cubic feet a proportion of all the cost and expense of the establishment, machinery, and interest of capital, but of the profit of the company. It is clear that the company have not in making the additional 250 cubic feet sustained this loss. The amount, therefore, would be the measure of the profit or benefit derived from the use of the meters. The Master has not even carried out his own principle, for he has not allowed for the cost of the meters,

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meters, or for any expenses by which the saving ha been effected.

That the Master has not adopted a correct mode c estimating the profits derived from the use of the mete seems to me quite clear. It is therefore impossible t confirm his report: but it is also, I think, impossible t allow the exceptions, all of which assert the propositio that no benefit or profit has arisen from the use of th meters, within the meaning of the decree. Of this I fe no difficulty at the hearing of this appeal; but I felt th same anxiety which the Master of the Rolls has ex pressed, to make, if possible, such a declaration of th opinion of the Court upon the construction of th decree, as might guard the parties against the chanc of a second failure before the Master. Upon carefull considering all the circumstances of the case, however I am satisfied that I cannot do so consistently with th usual practice of the Court, or with any certainty, i the present state of the inquiry, of not promotin instead of preventing the chance of error. There i nothing doubtful or ambiguous in the terms of th decree, nothing therefore to be explained by any ex planatory order, and I have no authority to depar from, or in any respect to vary the directions it con tains.

I am quite aware of the difficulty which may, in deed must, arise in doing with accuracy what the de cree directs. To ascertain the profits created by th application of particular means, and, for that purpose to refer a just proportion of the profits made to som only of the agents employed, may involve questions o the greatest nicety; but such is the duty which the de cree has imposed upon the Master. A similar dut was imposed, and similar difficulties were experienced i

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*Brown* v. *De Tastet.* (a) There the object was to ascertain the profits made by the use of a particular portion of the capital employed; here, by the application of a particular part of the machinery used. In that case the Plaintiff had, I believe, ultimately to lament that in attempting to give to her what, abstractedly, she was thought to be entitled to, the means by which that object was to be attained were not sufficiently considered. It is easy to foresee many of the difficulties which may arise in taking the accounts directed by the decree, but impossible by anticipation to prescribe to the Master the means of solving them. Some considerations indeed, though essentially affecting the profits in question, seem to be beyond the reach of calculation. It is obvious, for instance, that the use of the meters, by preventing fraud and the effects of negligence, would enable the company to supply the gas at a lower rate, and so either cause an abatement, or prevent an increase, in the charge; the necessary consequence of which would be to increase the consumption, and add to the profits. But to what extent this effect was thereby produced, and what profits were thereby created, it is impossible to appreciate. In any business in which much money is lost by bad debts, those consumers who pay may be supposed generally to indemnify the tradesman against the dishonesty of others, by the additional price they are compelled to pay; but, if all paid, the same profit would result from selling at lower prices, and the additional profits from the increased consumption would be great, but incapable of being reached by previous calculation.

So long as it shall be the course of this Court to direct such accounts of profits—and there are many precedents

(a) *Jac.* 284. See also Lord *Brougham's* observations in *Docker* v. *Somes*, 2 *Mylne & Keen*, pp. 665—8.

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cedents to support them,—(whether those precedents justify the decree in this case, it forms no part of my duty to inquire) such among other difficulties will arise, which must be in some manner surmounted. This can only be attempted, when they actually occur, in pursuing the investigation directed. It is impossible, by any declaration or direction, to provide for them by anticipation.

I regret the difficulties to which the Plaintiff is exposed in prosecuting the right which the decree gives him; and that I have not the means, in this state of the proceedings, to assist him. But I would seriously submit to the consideration of both parties, the expediency of terminating this contest by some compromise and arrangement. The Plaintiff has very large rights under the decree, but is met by very serious difficulties in obtaining the fruits of it. The Defendants, on the other hand, have this difficulty hanging over them; and although they may trust to the difficulties in the way of the Plaintiff, they may be assured that the decree has in it, that which must, if prosecuted, subject them to great vexation and expense, independently of what they may have ultimately to pay from the result of the account. It is a case, therefore, in which it would seem that a reasonable compromise must be for the benefit of both the parties litigant; and it was for the purpose of informing them of what, in my view of the case, constitutes the real situation of each, in the hope of leading both to think seriously of the evils of further litigation, that I have been induced to go more into detail, than the duty I have at present to perform seemed to require.

Upon the whole, I am of opinion that the Master of the Rolls made the proper order; and that if the contest is to continue, the present Master must renew the attempt to take the account directed by the decree.

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Being of opinion that the order of the Master of the Rolls was right in principle and in form, and that the proposition raised by the appeal, that the report ought to have been confirmed, or that the exceptions ought, at all events, to have been over-ruled, cannot be supported, I must dismiss the petition of appeal with costs.

## BYFIELD *v.* PROVIS.

*Nov.* 9.

The Lord Chancellor will not entertain a second petition of rehearing or appeal before himself, unless leave has been previously granted, upon an application for that purpose.

THIS cause was originally heard and decided by the Vice-Chancellor. The Defendant afterwards presented a petition of re-hearing to Lord Chancellor *Brougham*, who affirmed his Honor's decree. The cause now came on again to be heard before the Lord Chancellor, upon a petition of appeal presented by the Plaintiff, praying that certain special alterations might be made in the decree.

Mr. *J. Russell*, for the Defendant, objected that, according to the rule laid down in *Deerhurst* v. *Duke of St. Albans* (*a*), *Mousley* v. *Carr* (*b*), and similar cases, there could be no second rehearing without the special leave of the Court first asked and obtained.

Mr. *Wigram* and Mr. *Bethell*, for the Appellant, said that the variations which were now sought to be introduced into the decree, did not affect the merits, or involve any of the points which were in contest on the former rehearing. The only object of this petition was to render the decree consistent with itself and with a document

(*a*) 2 *Russ. & Mylne*, 702.
(*b*) 3 *Mylne & Keen*, 205. 291.; and see *Attorney-General* v. *Ward*, 1 *Mylne & Craig*, 449.

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document to which the ordering part of the decree in terms referred; and it would be absurd and oppressive to compel the Plaintiff to resort for that purpose to the expensive and tedious remedy afforded by the House of Lords. This petition, therefore, fell within the principle of those excepted cases in which the Court had allowed a second hearing in the Court of Appeal.

*The* LORD CHANCELLOR said, that as he had heard a considerable part of the case, he would not, under the circumstances, turn the Plaintiff round on the objection now suggested; especially as the rule did not seem to have been publicly promulgated. (*a*) For the future, however, the rule must be understood to be peremptory (and certainly it was a rule by which he was disposed strictly to abide), that a cause should not be brought before the Lord Chancellor for a second rehearing unless leave should have been previously granted, upon a special application for that purpose.

(*a*) The intention expressed by the Lords Commissioners of issuing a general order on the subject (see 3 *Mylne & Keen* 208.) was not carried into effect

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## SALMON *v.* RANDALL.

*July* 11. 23, 24, 25.

THE question in this case principally turned upon the construction of two local acts of parliament, the 28 *G.* 3. *c.* lxiv., intituled "An act for the better paving, cleansing, and lighting the town of *Cambridge*; for removing and preventing obstructions and annoyances; and for widening the streets, lanes, and other passages within the said town;" and the 34 *G.* 3. *c.* civ., intituled "An act to enlarge the powers" of the last-mentioned act. As the Lord Chancellor, however, in dealing with that question and disposing of the injunction granted by the Vice-Chancellor, found it necessary to consider a general principle of some importance with reference to the control of courts of equity over persons invested with powers by local acts of parliament, it has been deemed expedient to report his Lordship's judgment, in which all the material facts are shortly summed up.

Mr. *Jacob* and Mr. *Geldart* for the Plaintiffs.

Mr. *Knight Bruce* and Mr. *Girdlestone* for the Defendants, the Commissioners, and *Randall*, their clerk.

Mr. *Greene* for the Defendants, *Trinity Hall* and *Corpus Christi College, Cambridge*, who were the owners of the houses in question.

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*The* LORD CHANCELLOR.

In this case an application had been made to the Vice-Chancellor by the Plaintiffs, who were interested as

The Commissioners appointed under the local acts of parliament for improving the town of *Cambridge* have, upon the true construction of those acts, a continuing right to exercise from time to time the power thereby vested in them, of taking property for the purposes of the Acts, and of referring the assessment of the price to a jury, so long as may be required for carrying into full effect the purposes contemplated by the acts.

A person whose property is required by the Commissioners for the purposes of the acts is not entitled to restrain them, by injunction, from taking the steps prescribed by the acts for obtaining possession of the property, until they shall have shewn a sufficient fund in hand to satisfy the price which may be awarded to him, or until they shall have shewn the means by which they propose to procure it.

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as lessees, in certain houses in *Cambridge*, for an injunction to restrain the Commissioners, acting under two local acts of parliament, from proceeding to enforce the compulsory purchase of the houses, under the powers supposed to be conferred on them by those acts.

It appears that notice had been given to the Plaintiffs by the Commissioners, of their intention to take the houses in question, and that they were proceeding to have the value of the premises ascertained by a jury; and the application made to the Vice-Chancellor was to stop all proceedings. The Vice-Chancellor's order was confined to their proceeding to summon, and lay the case before a jury, his Honor declining to carry the injunction any further.

The present application, on the part of the Commissioners, is to dissolve that injunction; and, on the other hand, the Plaintiffs have given a notice of motion for the purpose of extending the injunction to the other objects which the Commissioners had in view, and particularly of restraining the Defendants from taking possession of the premises in question.

Two grounds were laid in support of the application. The first was, that, under the acts of parliament, the Commissioners had no authority to take the premises in question: the second was, that, assuming they had such authority, still, inasmuch as, according to the Plaintiffs' statement, it appeared they had not funds applicable to the purpose, they ought to be restrained by this Court from exercising the legal right, supposing them to have such right.

The Vice-Chancellor was of opinion, upon the construction of the acts of parliament, that the Commissioners

ioners had the legal right, and that a power continued n them, by which they would be authorised to compel he purchase, and the assessing of the premises before a ury. But he was of opinion, that, there not being atisfactory evidence before him that the Commissioners had funds in their hands, or within their reach, adequate to the purchase of the premises in question, upon the supposed authority of, or rather the supposed analogy o, some cases decided by Lord *Eldon*, the Court ought o interfere by injunction, and prevent the case from eing brought before the jury.

Upon the first point, after looking carefully through e acts of parliament, I am very clearly of opinion that e Vice-Chancellor's construction of the acts of parlia- ent was correct; and I really see very little ground to ubt it, and very little difficulty about the matter. lthough the acts of parliament are inaccurately and artificially framed, and some parts of them not very oncilable with other parts, yet, taking the whole of e provisions of the acts together, I have not the least ubt that the object of those acts was to vest in the mmissioners a power, from time to time, as they ght see occasion, to purchase or take premises which ey might consider necessary to be taken down for the rpose of widening and improving the streets of the wn of *Cambridge*. The acts of parliament had other jects, namely, the paving, cleansing, and lighting of e town, and keeping the streets in proper order. All ese objects are comprehended in the acts; the requi- te powers for them are vested in the Commissioners; e powers are undefined in point of time, and the funds, so, are undefined in point of time, inasmuch as no riod of years is specified for which the Commissioners e empowered to levy rates or to get the tolls. The mount to be raised in each year, that is to say, the

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per-centage, is, indeed, limited; but the Commissioner have a continuing power to levy the rates; and then being the power to impose the tolls, from time to time I can find nothing in these acts of parliament which would limit or prevent the Commissioners from using the funds so as to carry the several objects of the acts of parliament into execution; one of those objects, and a leading one, being to purchase or take and pull down buildings for the purpose of widening and improving the streets.

It is hardly necessary for me to advert to the particular clauses introduced for those purposes; but as one of the grounds on which the case for the Plaintiff has been rested, is that the powers of the Commissioners have determined, I will advert shortly to the sections which appear to me to put an end to all doubt on the matter.

[The LORD CHANCELLOR here entered into a minute and critical examination of the language and leading provisions of the two acts of parliament, and of the inferences which, in the Plaintiffs' argument, had been drawn from them, as indicating that the powers of the Commissioners were intended to be temporary only, and had now ceased to be operative. His Lordship then proceeded]:—

Upon these several provisions, it is impossible to entertain a doubt that the Commissioners have the power they have assumed; and such was the opinion of the Vice-Chancellor.

It was argued, however, that, although they have the legal power, and although they are within the provisions of the acts, and although the time has not gone by within which

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which they are to exercise the power, still they ought to be prevented from doing so, because there do not appear to be funds in their hands, that is to say, now in their hands, immediately applicable to this purpose, so as to enable them to carry their proposed compulsory purchase into effect. The Vice-Chancellor clearly does not understand the object and effect of his order to be to prevent the Commissioners from proceeding at all times, but merely to prohibit this at the present time; because he contemplates some other mode of proceeding, some other means of procuring money, and suggests the propriety of their making a rate before they complete the purchase, in order partly to have the question raised upon the legality of the rate, and partly to put themselves in possession of funds by means of which they may be enabled to carry the purchase into effect. His Honor granted an injunction to restrain the Commissioners from proceeding to have the value of the premises assessed before a jury.

In support of his view, the Vice-Chancellor referred to two cases before Lord *Eldon*, *The Mayor of King's Lynn* v. *Pemberton* (*a*), and *Agar* v. *The Regent's Canal Company*, which is mentioned in the note to that case. In the judgment of Lord *Eldon* in *The Mayor of King's Lynn* v. *Pemberton*, we have a statement by Lord *Eldon* himself of the ground on which he proceeded in the case of *Agar* v. *The Regent's Canal Company*. Lord *Eldon* there said,—"In the case of *Agar* v. *The Regent's Canal Company*, I acted on the principle that, where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the legislature

(*a*) 1 *Swan.* 244.

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legislature has given to the speculators a right to carry the canal, can shew that the persons so authorised are unable to complete their work, and is prompt in his application for relief, grounded on that fact, this Court will not permit the further prosecution of the undertaking." (*a*) His Lordship then refers to another case which does not appear to me to have any application to the present. His words are, — "So, in another case, a Mr. *Taylor* filed his bill, stating that, at the time of subscribing, he expected that, when he had paid the whole of his instalments, he should find the canal complete; but that, with the present fund, it would not pass to the east of *Hampstead;* and the Court thought him entitled to relief." That must have been upon the ground of misrepresentation or fraud practised on the party purchasing a share in the canal, and does not appear to me to be applicable.

The case of *Agar* v. *The Regent's Canal Company*, however, undoubtedly lays down a principle which may be extremely important in its application; and I apprehend Lord *Eldon* must have gone upon this ground, that where acts of parliament impose certain severe burthens on individuals, by interfering with their private rights and private property, for the purpose of obtaining some great public good, if the Court sees that the undertaking cannot be completed, and therefore that the public cannot derive that benefit which was to be the equivalent for the sacrifice made by the individual, the Court will protect the individual from being compelled to make that sacrifice, under the circumstances, and until it appears that the public will derive the proposed benefit from it. It is impossible to suppose Lord *Eldon* could have meant that, after an act of parliament

(*a*) 1 *Swan.* 250.

parliament has been passed giving certain powers, and authorising a body of persons to carry on certain works, those against whose rights such works are to be carried into effect are to come into this Court and say, "We will undertake to prove that you cannot, with the money which you have in hand, carry those works into effect;" and that therefore, and immediately, in that state of circumstances, the Court is to interfere. If that were so, it is quite obvious that, not a single bill passes the legislature, authorising the formation of a railway or a canal, but would be brought immediately into this Court; thus making it the duty of the Court to investigate the probable expense of the speculation; and if it appeared that the money which the parties had at the time would not enable them — as in those cases, generally, it would not enable them — to carry their speculation into effect, the Court would be called upon to say they should be prohibited from going on with it altogether.

The consequence would be, that this Court would be assuming to itself a power which would be neither more nor less than the repealing of an act of parliament. Lord *Eldon*, it is clear, could never have meant that; and he must, therefore, be supposed to have put his decision on the ground I have referred to. In the case of *The Mayor of King's Lynn* v. *Pemberton*, it appears that the defendants were not working on any land belonging to the plaintiffs; and Lord *Eldon* refused the injunction. One reason stated in answer to the application was, that, although there appeared to be a deficiency of funds to enable the Company to complete their work, they were applying to parliament to get further powers — not that they had obtained further powers, but that they were applying for them. Lord *Eldon* upon that observed, "A peculiarity in this case is the pending application to parliament." I do not perceive

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ceive how that could make any difference, because it is open to all companies, and to all parties, to apply to parliament. If they got a new act, that might alter the case; but how the circumstance of the parties applying to parliament was to give them a right which they would not have if they had not been making that application, I confess I do not understand. I cannot but think that, on further consideration, Lord *Eldon* was disposed to limit, and felt the necessity of limiting the proposition which he is supposed to have laid down in *Agar* v. *The Regent's Canal Company.*

The question then is, assuming the rule to be as Lord *Eldon* is supposed to have laid it down in the case of *Agar* v. *The Regent's Canal Company*, what application it has to the present. The principle of that case, taking it in the way assumed, was, not that the company had no power to purchase the land they proposed to purchase, but that they did not appear to have the means of carrying into effect the whole of the plan they had projected; and that, therefore, the ground on which they acted in taking from the individual the right of dominion over his own property, could not be supported; and the consideration failed. Now what analogy has that to the present case? There is no one individual object to be accomplished here: the powers of this act are for a variety of objects, all tending to the same effect. There is no one defined purpose to be carried into effect; but the Commissioners are, from time to time, to be at liberty to exercise their powers for the purpose of widening and improving the streets of *Cambridge.* Every purchase they make, every house they take down, is a distinct work in itself, and to that extent accomplishes the object. The principle, therefore, of Lord *Eldon*'s observations does not, as it strikes me, apply in the slightest degree to the present case.

If

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If Lord *Eldon* had laid it down that, wherever a public body of this description, wherever commissioners or an incorporated company propose to purchase or take any particular property, the Court will see beforehand, before the contract is complete, before the sum to be paid is ascertained, not only that they have the means of paying for the property so proposed to be purchased or taken, but that the money which they have, and mean to apply for the purpose, is raised according to a particular mode prescribed by the act of parliament, then such a proposition would come up to the present case. But no such proposition is laid down by his Lordship; and it would be quite a new principle to contend that a party who is under an obligation to sell his property, either under the provisions of an act of parliament or otherwise, has a right to ask the purchaser — where do you get the money from, with which you are to pay for the property you are purchasing of me?

The clauses which enable the Commissioners to complete the purchase provide that, upon payment of the sum awarded by the jury, they are to have a conveyance; that, upon the conveyance being made, they are to have a right of entry after a certain notice; and the means of payment would naturally flow from those powers which they are, by force of the acts of parliament, authorised to put in execution for the purpose of raising the money. But no authority is to be found, either in those acts of parliament or in any decision, for holding that a party, being compelled to sell his property, has a right to put to the purchaser any such question as I have just mentioned. It is not pretended that the seller has any interest in the source from which the money comes; but the argument is, that, being an owner of premises which the Commissioners wish to buy, he has a right to say — "You

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shall not purchase my premises except with mone[illegible] raised in a particular way under the act of parliament;" [illegible] and that is the very ground on which the Plaintiff, Mr [illegible] *Salmon*, has resisted this purchase.

No doubt the power to raise the money is extremely [illegible] important, in determining the extent to which the righ[illegible] to purchase goes. The argument may be very sound, [illegible] that if the power to raise money is limited, the right to [illegible] purchase ought not to be carried beyond the powe[illegible] given to raise the money for the purchases by mean[illegible] of which the objects of the acts of parliament are t[illegible] be effected. But that is not the question here: th[illegible] question is, assuming the power of purchasing to b[illegible] within the provisions of the acts, has the vendor a rig[illegible] to say, "Let me know exactly where the money com[illegible] from, and how it was got, which you mean to app[illegible] in completing this purchase?" The cases cited ha[illegible] a reference to no such right, and proceed on total[illegible] different principles.

Now, although there is, on the affidavits, very gre[illegible]eat difficulty in ascertaining how the Commissioners ar[illegible]re, within a reasonable period, to raise the money for co[illegible]m-pleting this purchase, yet I do find that there is a pow[illegible]wer to raise money. I know not what the value of the pr[illegible]ro-perty may be: that is a matter of total uncertainty.[illegible]ty. The affidavits on the different sides differ extremely, [illegible] as one might expect, with respect to the supposed value of [illegible] of the premises. I cannot tell what the jury may assess as their value; and I am equally unable to ascertain how much money the Commissioners may be able to raise by the 1*s.* rate, or by the 1*s.* rate and the 3*d.* rate, which they are authorised to raise, or by the tolls; all of which are within their power by the terms of the acts of parliament; and, according to the construction I put

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upon the acts of parliament, whatever moneys may be raised in that way, and which they are authorised to raise, may be applied to the purposes of the acts. I entirely abstain from going into the question, how far the Corporation or the University may be liable to contribute; but I find a power, beyond all doubt, vested in the Commissioners under the acts of parliament, by which they are enabled to raise money for these purposes, and I am left entirely in the dark as to what amount of money is required.

What ground, then, is there for the interposition of this Court, to prevent the Commissioners from exercising their legal right? Assuming that the Vice-Chancellor and myself are correct in our construction, there is no doubt that they have the power, and no question as to their legal right to purchase. They have given a notice; the act of parliament is imperative, that the jury shall assess the value; and the Commissioners must tender the value so assessed. The owner is to hold, until the value has been assessed by the jury, and the tender made: then, upon the tender, certain acts are to be done, which will vest the premises in the Commissioners; but till then the property remains in the owner, untouched. The order of the Vice-Chancellor prevents them, therefore, from having the property vested in them, or acquiring the dominion over the premises; but it still leaves the parties in the situation of vendor and purchaser, inasmuch as the Commissioners have given the notice; and the Vice-Chancellor's order cannot disturb the position of the parties.

I find no authority in the cases referred to which distinguishes this case from any other in which parties are exercising a legal right. The parties, I conceive, are put into the situation of vendor and purchaser by the notice;

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notice; and like every other vendor and purchaser, they must of course complete their purchase, according to the provisions, not of the contract, but of those arrangements which the act of parliament has substituted in lieu of the contract, in a case where no contract can take place.

It would, as it seems to me, be most inconvenient for both parties if the Court were to leave them in their present position; a position in which neither of them can interfere with the property, the notice effectually preventing them. It is vain for the owner of the property to suppose that he is at liberty to go on dealing with this land, and expending money upon it, as if it were his; because if the Commissioners complete their purchase, he is building not on his own land, but on the land of the Commissioners. It is impossible to say what view the jury may take of the matter; but I apprehend, that if they take a correct view, they will look at the situation of the property, and fix the value as it stood at the time when the notice was given; from which time it was the property of the Commissioners, and ceased to be the property of the vendor. While, therefore, it would be most inconvenient for the owner to be left in his present situation, it would be also most inconvenient for the Commissioners; because the only thing they could do would be to make a rate to enable them to complete the purchase of the property; which property they are, by the injunction of this Court, restrained from purchasing.

If any case arises after the jury has assessed the value; if payment is not made; or if any other difficulty occurs, that will form the subject of a new and distinct case. I am only considering now how far the Court ought to interfere by injunction between the parties, to prevent the jury from assessing the value.

I am

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I am of opinion that it is not only consistent with the rights under the acts of parliament, but the most convenient course for all parties, that the jury should go on to assess the sum at which the Commissioners may purchase these premises; and whether they can, or whether they cannot, purchase them, still it is necessary that the jury should tell them what the sum is which they will have to pay.

Upon these grounds, I am of opinion that the order of the Vice-Chancellor, for the injunction, should be discharged; and as the motion on the part of the Plaintiffs, for extending the injunction, of course necessarily fails also, that motion must be refused with costs.

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## GLASCOTT *v.* LANG.

*July* 28. 30, 31.
*Aug.* 1. 3.

The Court possesses, and will exercise, jurisdiction over a bottomry bond in a case of fraud; and will, for that purpose, restrain proceedings upon the bond in the Admiralty Court by injunction.

THIS was a suit instituted by the mortgagees of a ship called the *Margaret Ogilvie*, and of her freight and earnings, for the purpose of having a bottomry bond delivered up to be cancelled, as being in fraud of the Plaintiffs, and for an injunction against any proceedings in the Admiralty Court in respect of the bond.

At the time when the bill was filed, no proceedings in that Court had been commenced.

The

It is not necessary, for the purpose of supporting an interlocutory injunction of that kind, that the Court should find a case which would entitle the Plaintiff to relief at all events; it is sufficient if the Court finds, upon the evidence then before it, a case which makes the transaction a proper subject of investigation in a court of equity.

After long acquiescence under such an order, the Court will not readily entertain an application for dissolving it.

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The case made by the bill was, that, subsequent to the date of the Plaintiffs' mortgage, the bond question had been fraudulently granted at *Trieste* t the acting master of the ship, in concert and collusi with the obligees in the bond, who were now represent by the principal Defendants. The material circumstanc of the transaction, and the subsequent proceedin of the parties, are shortly referred to in the judgment.

Upon a motion founded on affidavits, the Vic Chancellor made an order granting the injunction, o the 15th of *March* 1837, and the answers having bee subsequently put in,

Mr. *Jacob* and Mr. *Sharpe* now moved to discharg that order. They contended, first, that unless sor very special case was made, a Court of Equity cou not interfere with a matter which was properly ar peculiarly cognizable in the Court of Admiralty, Court which itself acted upon equitable principle and had the power, if the case required it, of mod rating the amount of the demand to be recovered upc the bond; *The Zodiac.* (*a*) It was clear that th Court of Chancery had not a concurrent jurisdictio and it could not be denied, as the case now stoc upon the answers and affidavits, that the bond, to large extent at least, was given to secure a valid an *bonâ fide* debt, which was properly the subject of bc tomry. They further contended, that upon the pa ticular circumstances disclosed upon the affidavits ar in the answers, no case of fraud was made out, and th the Court, therefore, even if it possessed the jurisdictio would not be disposed, and ought not, to exercise i With respect to the purposes for which, and th parties by whom, bottomry bonds might be effectuall given, and the validity of such bonds as against pric mortgagees

(*a*) 1 *Hag. Adm. R.* 320.

mortgagees, the following cases were referred to: — *The Nelson* (*a*), *Boddington's* (*b*), *The Hero* (*c*), *The Alexander* (*d*), *The Duke of Bedford* (*e*), *The Ysabel.* (*g*)

Mr. *Knight Bruce* and Mr. *Heathfield*, *contrà*, in support of the injunction, submitted that the right of the Court to interfere in a case of this kind, as in every other case involving questions of circumvention and fraud, was indisputable. A similar jurisdiction had been very recently exercised by Lord *Langdale* over a bottomry bond, in an unreported case of *Dobson* v. *Lyall* (*h*) at the Rolls. The facts of the present case, as

(*a*) 1 *Hag. Adm. R.* 169.
(*b*) 2 *Hag. Adm. R.* 422.
(*c*) 2 *Dods. Adm. R.* 139.
(*d*) 1 *Dods. Adm. R.* 278.
(*e*) 2 *Hag. Adm. R.* 294.
(*g*) 1 *Dods. Adm. R.* 273.
(*h*) *Dobson* v. *Lyall*, originally decided at the Rolls on the 14th of *January* 1837, was a suit by the first mortgagee of a ship, seeking to set aside or postpone a bottomry bond, which was subsequently granted by the master and part-owner of the ship, when at *Calcutta*. Lord *Langdale* thought that, upon the evidence in the cause, the case of fraud was made out, and the decree declared that the bond was wholly void as against the Plaintiff.

Upon the appeal, however (*November* 7, 8, 9. 12. 1838), of the Defendants, Messrs. *Lyall*, who were the holders of the bottomry bond, the Lord Chancellor was of opinion that the bond would probably be found to be valid, at least to a considerable extent; and he therefore varied the decree at the Rolls, by directing an inquiry as to what sums of money were necessarily payable and paid to the captain, for the purpose of enabling the ship to proceed on her voyage; and also an inquiry as to what sums of money were in the hands, or at the command of the captain, for the purpose of meeting those demands, otherwise than by raising money on bottomry. The decisions of the Master of the Rolls and the Lord Chancellor both assumed that the Court of Chancery had jurisdiction over bottomry bonds, on the ground of fraud; but as the case on the appeal involved no general principle, it will not be reported.

The *Solicitor-General* and Mr. *Sharpe* for the Plaintiff, the Respondent on the appeal.

Mr. *Tinney*, Mr. *Wigram*, and Mr. *H. J. L. Williams*, for the Defendants who appealed.

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as they appeared upon the admissions in the answer, were fully sufficient to justify the interference of the Court.

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*Aug. 3.* *The* LORD CHANCELLOR.

The principal point in this case turned upon the question how far this Court had jurisdiction, and, if had jurisdiction, how far it ought to exercise jurisdiction, in restraining a party from proceeding in a suit in the Admiralty Court upon a bottomry bond. The bottomry bond having been given at a foreign port, *Trieste*, the obligees transmitted the bond to this country and proceeded to enforce it. Those who had the property in the vessel, and who were therefore to be affected by the bond, before any proceedings were instituted in the Admiralty Court, filed the present bill, impeaching the security, on the ground of fraud, or at least improper dealing, on the part of those who obtained the bottomry bond.

The first question raised was, whether this Court had jurisdiction. From the commencement of the argument to the present moment, I never entertained the slightest doubt that the Court had jurisdiction; indeed I see nothing to raise the question. No authority has been cited to shew that this Court has no power over such an instrument alleged to be executed in fraud, or under any other circumstances which would induce the Court to interfere. The instrument, whether it be a bottomry bond or any other species of bond, is a security for money alleged to have been obtained under circumstances which a court of equity ought not to give effect to; and the Plaintiffs come here asserting their equity, to get rid of the obligation, whether as against the

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the person or as against the property, in the ordinary course of administration of equity in this Court. Not only is no authority cited, but no reason is urged which induces me to entertain the slightest doubt on the subject. In fact the point was conceded; for Mr. *Jacob*, in his reply, in answer to a question of mine, admitted that a case might exist in which the Court would interfere; and if a case might exist, the question is upon the circumstances, and not upon the jurisdiction.

Assuming, then, the question of jurisdiction to be put entirely out of view, it remains only to be considered whether this is a case in which, at the present moment, it would be a sound exercise of the discretion of the Court to dissolve this injunction.

Now, in the first place, I have looked, as far as I have been able, through the case made upon the affidavits, and upon the pleadings; and, in looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the Court should find a case which would entitle the Plaintiff to relief at all events. It is quite sufficient if the Court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a Court of Equity; and on that I think it would be very difficult here to raise any dispute.

In ordinary cases of bottomry bonds, the owners have, at least, the security of their own agent, the master, who is supposed to be dealing with strangers, and whose duty it is to make the best bargain he can for the owners. I find, however, that here the owners have entirely lost that security. Looking at what took place at *Trieste*, although possibly the transaction may be proved to be all right, — looking at what took place at *Trieste*,

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*Trieste*, I find that the master, and those who were to take the benefit of the bottomry bond, were at least acting together against the owner; that the owner had not the protection of the master; the master so appointed not being the person who sailed as the original master of the vessel, but an officer who succeeded, on the death of the master, and one who was appointed master at *Trieste* by the intervention of the very persons who were to have the benefit of the bond, or, at least, by the house which those persons represent, and by the authority of the Vice-Consul there. The individual in question is appointed master on the very day before this bond is executed. That may be all quite right; it may have been necessary in order to give legal validity to a perfectly fair transaction; but it is impossible to say that it does not raise a proper question which the owners may well be expected to litigate in a Court of Equity. That is one of many considerations.

Then there arises this question: — At *Rio* certain money is said to have been advanced, but nothing was done there to throw any charge upon the vessel; no bottomry bond was taken at *Rio*, but the vessel proceeded on her voyage from *Rio* to *Trieste*; and there being nothing to fix the vessel with any liability under the bottomry bond for the balance supposed to have been due at *Rio*, the bond is taken at *Trieste*, and for a sum including the debt incurred at *Rio*. All that, by possibility, may be explained; but to say that this is not a fair matter for investigation and inquiry is, I think, saying much more than the facts warrant. There is, in the case, a great deal more of suspicion — at least of that which requires investigation — of that in the face of which this Court will not permit the instrument to have its legal operation without further investigation and inquiry.

Now,

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Now, if the injunction had been to restrain proceedings upon an ordinary money bond, and I had seen, upon the pleadings and the evidence, a case of so much suspicion, or matter requiring so much investigation, admitted in the answer, as I find upon the affidavits and pleadings in this case, I should not for a moment have hesitated in saying that I could not allow the parties to proceed to enforce their legal right until a court of equity had had the opportunity and means of ascertaining to what extent that legal right ought to be permitted to be carried into effect. The proceeding in the Admiralty Court is to enforce a legal right; and the only answer suggested to that is, that the Court of Admiralty has a power which a court of law does not exercise over an instrument of this nature — namely, a power of permitting it to take effect to a limited extent, and of disallowing sums of money not properly forming the subject of a bottomry bond. The Court of Admiralty, however, so far as I am aware, possesses no jurisdiction, and none such has been asserted, enabling it to exercise the power which this Court exercises over the instrument itself, for the purpose of setting aside that which ought never to have existed, so as to prevent any validity being given to an instrument which originated in fraud. But, whether the Court of Admiralty has or has not such a jurisdiction, it is not because another court has concurrent jurisdiction that this Court is to be stayed, particularly in a case like the present, where the proceedings in this Court were instituted first; and where the question is, whether this Court, having acquired jurisdiction over a subject-matter peculiarly within its jurisdiction, is to abstain from exercising that jurisdiction because, afterwards, proceedings are instituted in another Court, which may or may not have a similar jurisdiction.

and after all the cost has been so incurred, and this Court has had possession of the cause, and the parties have been put to great expense in litigation here, I am then asked to withdraw the jurisdiction of this Court, and to interfere no further in the cause, but to send the parties back to the Admiralty Court upon a question which was quite open in the month of *March* last year.

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Now, for all these reasons, I see no ground whatever for this application. I think it comes very much too late, and there is no fact before me to justify it: there is no point of law upon which it can be supported; I think, therefore, it must be refused, and with costs.

## BOOTH *v.* LEYCESTER.

*Feb.* 8, 9.
*Nov.* 13.

THIS was the appeal of the Plaintiff against the decree made by the Master of the Rolls at the hearing of the cause, and also against a subsequent Order of

An owner of real estates in *England* and *Ireland* granted a number of annuities, some of which were specifically charged by the deeds upon the grantor's *English* estates, with powers of distress and entry for recovering the amount, and all costs, losses, charges, damages, and expenses occasioned by the same not being duly paid: others were secured by the covenant of the grantor and a surety, with a proviso for redemption on payment of a certain sum, and all costs, charges, and expenses: all of them were further secured by warrants of attorney to confess judgment, upon which judgments were entered up. Upon a bill filed by an assignee of these annuities, after the death of the grantor, for payment of the arrears of the annuities, together with interest, it was held that he was not entitled to interest upon the arrears of any of the annuities, there being no proof that he had been delayed by the absence or conduct of the grantor.

The assignee having afterwards instituted a suit in *Ireland* to recover the arrears of the annuities out of the grantor's estates in that country, an order was made directing that, upon payment of what was found due to him in the suit in this Court, in respect of the annuities specifically charged, he should execute releases of those annuities, and enter up satisfaction on the judgments by which they were secured, and be restrained from prosecuting the suit in *Ireland* until further order.

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of the 3d of *March* 1837, made upon the Defendant's petition in the cause. The argument and judgment in the Court below, upon both occasions, are reported in the first volume of Mr. *Keen's Reports* (*a*), where the different instruments, and the history of the transactions out of which the questions in the cause arose, are fully set forth. The several points raised by the appeal, and the material circumstances upon which they turned, are also shortly recapitulated in the Lord Chancellor's judgment.

Mr. *Wakefield*, Mr. *Wright*, and Mr. *Beales*, for the appeal.

Mr. *Tinney* and Mr. *Lovat*, and Mr. *Spence*, *contrà*.

The general line of argument adopted on both sides was substantially the same as had been taken in the Court below. The following additional authorities were referred to; *Batten* v. *Earnley* (*b*), *Blackmore* v. *Flemyng* (*c*), *M'Clure* v. *Dunkin* (*d*), *Parker* v. *Hutchinson* (*e*), *Wynn* v. *Williams* (*g*), *Clarke* v. *Seton* (*h*), *Saunders' Reports, by Serjt. Williams.* (*i*)

The leading arguments urged in support of the appeal are stated and considered in the judgment.

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*Nov.* 13. *The* LORD CHANCELLOR.

The facts of this case, so far as they affect the questions raised upon the appeal, are as follow:—

(*a*) Pages 247. 579.
(*b*) 2 *P. Wms.* 163.
(*c*) 7 *T. R.* 446.
(*d*) 1 *East*, 436.
(*e*) 3 *Ves.* 135.
(*g*) 5 *Ves.* 130.
(*h*) 6 *Ves.* 411.
(*i*) Vol. ii. p. 107. note.

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Sir *John Roger Palmer* was entitled to certain estates in *Ireland*, as to part in fee, and as to other part, for life, subject to certain charges.

His wife, Lady *Palmer*, before her marriage, was entitled to 2000*l.*, part of a larger sum, secured upon a mortgage in *England*, and to one fourth part of certain estates in *Middlesex*. By articles previous to the marriage of Sir *John Roger Palmer* and Lady *Palmer*, provision was made for Lady *Palmer*, and the children of the marriage, out of the *Irish* estates, and the fee was reserved to Sir *John Roger Palmer*. (*a*) The *Middlesex* estates of Lady *Palmer* were conveyed in trust for sale; and the proceeds, and her fortune in money, were to be applied in paying off, first the charge upon Sir *John Roger Palmer*'s fee-simple estates, and, secondly, those upon his other estates. Part of the *Irish* estates were, at the suit of mortgage creditors, sold, and the proceeds applied in paying off the charges upon those estates. Lady *Palmer*'s *Middlesex* estates, and the 2000*l.*, were not applied as provided by the articles.

After the marriage (of which there was no issue), a brother of Lady *Palmer* having died, she became entitled, as his next of kin, to another sum of 2000*l.*, part of the same mortgage; but this sum not being affected by her marriage settlement, it became the property of her husband, Sir *John Roger Palmer*.

Sir *John Roger Palmer*, whilst the property was so circumstanced, granted many annuities for his life, and two forms were adopted in the deeds for this purpose:—

1. In

(*a*) The provision for Lady *Palmer* was by way of jointure; but, before the institution of the suit, that jointure had determined by her death; and there were no children of the marriage.

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1. In some he charged the annuities upon the shar[illegible]re in the *Middlesex* estates, which had belonged to Lad[illegible]d *Palmer*, with the usual powers of distress and entry fo[illegible]c recovering the annuity, "and all costs, losses, charges [illegible]e damages, and expenses, which should be occasioned by [illegible] l the nonpayment of the same on the days and time[illegible] appointed for payment thereof;" and he demised such [illegible] share in those estates for a long term to effect the same [illegible] purposes, either by receipt of the rents, or by sale or mort[illegible]r gage thereof. He also assigned the two sums of 2000[illegible]0 and 2000*l.*, upon trust for more effectually securing the [illegible]h payment of the annuities.

2. Other annuities were secured only by the covenan[illegible]nt of Sir *John Roger Palmer* and a surety, with a clause [illegible]of redemption upon payment of a certain sum, and a[illegible]ll costs, charges, and expenses.

All the annuities were further secured by warrants [illegible] of attorney to confess judgment, upon which judgment[illegible]nts were duly entered up.

I have shortly stated the history of the proper[illegible]ty charged with these annuities, because some argument [illegible]at the bar was addressed to that point; but it does n[illegible]ot appear to me that the question to be decided turns [illegible]at all upon the circumstances of such property. Th[illegible]he grantor of the annuities, either *jure mariti*, as to part [illegible]of the money, or from having paid off, out of his own fund[illegible]s, charges which the rest of it and the share of the *Mi*[illegible]*d-dlesex* estates were, by the articles, appropriated to pa[illegible]y, became entitled in equity to the whole; and it was co[illegible]n- petent for him, either to have the property included [illegible]*in* the articles applied according to their provisions, [illegible]*or* to receive it himself, so far, at least, as he was owner [illegible]*of* the fee of the trust estates; and this right he was e[illegible] titl[illegible]*d*

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titled to confer upon others. The grantees of the annuities, therefore, which were charged upon this property, were entitled to the same rights and remedies as if the property in question had originally belonged to the grantor.

The annuities not having been paid, and Sir *John Roger Palmer* having died, intestate, and without issue, the question arose, whether the annuities, all of which had become vested in the Plaintiff, were payable without interest upon the arrears. By the bill, which was filed by the assignee of the annuitants, on behalf of himself and all other the creditors of Sir *John Roger Palmer*, the Plaintiff prayed leave to enforce the securities against the property charged, and to be admitted as a specialty creditor for the residue of the debt, although, to the extent of enforcing the securities against the property charged, the interest of the Plaintiff was directly opposed to that of the other creditors.

The decree declared, that the estates and property of Lady *Palmer*, comprised in the marriage articles, were to be considered assets of the intestate Sir *John Roger Palmer*; and that the Plaintiff, in respect of the annuities specifically charged, was to be considered as a specific incumbrancer on the said estates and property, and was entitled to priority over the general creditors of the intestate; and that the surplus of such fund was applicable to the payment of what was due to the Plaintiff in respect of the other annuities; and the Master was directed to take an account of what was due to the Plaintiff in respect of the amount of the annuities so specifically charged, without interest. The common directions were given for realizing the property specifically charged, and for taking the accounts, as usual in a creditor's suit. The Master was directed to take an account of what was due in respect of the annuities not

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specifically charged, together with the other debts; but no special directions were given as to the interest.

A separate report was made with respect to the money due upon the annuities specifically charged, which report was confirmed; and the heir at law of Sir *John Roger Palmer* having presented a petition, stating that the Plaintiff had, in *November* 1833 (*a*), filed a bill in *Ireland*, as a judgment creditor, in respect of the same annuity deeds, to obtain payment out of the *Irish* estates; and it appearing that there were funds in Court here sufficient to satisfy the arrears of the annuities specifically charged, the Master of the Rolls made an Order, of the 3d of *March* 1837, directing that, upon payment of what was so found due, releases should be executed of those annuities, and satisfaction entered up on the judgments in *England* and *Ireland* given to secure them, and that the Plaintiff should be restrained from proceeding in the suit in *Ireland* till further order. (*b*)

The Plaintiff's appeal complains, first, of so much of the decree as directs the Master to take an account of the arrears of the annuities specifically charged, *without interest*; secondly, because it does not direct the Master to calculate interest upon the annuities not specifically charged; and, thirdly, it complains of the Order of the 3d of *March* 1837, because it directs the Plaintiff to execute releases of the annuities specifically charged, and acknowledge satisfaction upon the judgments given to secure them, and restrains proceedings in the suit in *Ireland*.

As to the second head of appeal, it is to be observed, that the decree directs the Master to take an account of the

(*a*) The bill in the *English* suit was filed in *January* 1833.

(*b*) See 1 *Keen*, 579.

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the debts of the intestate, and of what is due in respect of the annuities not specifically charged, and to calculate interest upon such of the debts as carry interest, so that the question of interest upon the annuities would, it should seem, properly arise upon the Master's report; but, as the annuities specifically charged were also secured by judgments, the question how far the judgments entitle the annuitants to interest is common to them all.

It was attempted to support the claim to interest on the ground that the grantor had withdrawn himself from the country, and by his own conduct prevented the Plaintiff from obtaining payment; but the evidence did not make out such a case, and the question therefore is, first, whether the charge upon the property entitles the annuitants to interest; and, secondly, whether the judgments do so.

The argument upon the first point is twofold; first, that though interest upon arrears is not stipulated for, in terms, by the annuity deeds, yet there are provisions which are equivalent, and therefore include it; secondly, that the annuitant, if he had pursued his remedy at law, might have obtained interest upon the arrears, and that he ought, therefore, to be allowed interest in equity.

The first ground rests entirely upon the provision, in the clause of entry, that the annuitant shall hold, until not only the arrears of the annuity, but all such costs, losses, charges, damages, and expenses, as shall be occasioned by the nonpayment of the annuity at the days and times stipulated, shall have been paid; — and upon some similar expressions which occur in the proviso for the cesser of the term. These provisions, it is contended, amount to a contract for interest. If, however, the parties had intended to contract for interest upon arrears, it would have been very easy for them to do so. Damages may, no doubt,

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doubt, be an equivalent for interest; but the two things are not only not the same, but are of a precisely opposite nature. Interest contracted for is due under the contract, and in pursuance of it; but damages are a compensation for a breach of the contract. It is impossible that the parties could have intended by these terms to contract for the payment of interest upon arrears; and a reference to other parts of the deed puts this beyond all doubt. The power of distress is for the annuity, and all arrears thereof, as in the case of a rent, to the intent to satisfy the arrears, and all costs, charges, and expenses to be occasioned by the nonpayment of the same. Next comes the clause of entry, in which the word "damages," coupled as it is with the words "costs, charges, and expenses," must be construed to mean damages incurred by or incident to the entry and holding possession. In declaring the trusts of the term, the expression is, "to raise the arrears of the annuity, together with all such damages, costs, charges, and expenses as the annuitant shall expend or be put unto by reason of the nonpayment of the annuity." In a subsequent part of this clause, the expressions are, "costs, charges, damages, and expenses incurred, suffered, borne, sustained, and laid out, by reason, or on account, of the nonpayment of the annuity." If it had been intended to stipulate for interest upon the arrears, or for an equivalent for it, that would have formed part of all the trusts, and an object of all the remedies; but, with respect to the 4000*l.*, the trust is only "to secure payment of the arrears, and all costs, charges, and expenses incurred or sustained by reason of the nonpayment." The covenant for payment is only for the annuity and the arrears thereof. So, it is provided that, upon the death of the grantor, "and full payment of all arrears, and of all such costs, charges, and expenses as aforesaid," satisfaction shall be entered up on the judgments; and, in the clause of repurchase, the provision is for payment

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payment of what shall be due "on account of the annuity, and of such costs, charges, and expenses as aforesaid." It appears to me clear that this deed does not contain any stipulation for interest upon arrears, or for any equivalent for it; but that the expression relied upon was introduced only for the purpose of securing the grantee against any damages or losses which he might sustain in enforcing the remedies, and not from the breach of the contract for payment. And that the grantee of one of the annuities so understood it appears certain from the language of the assignment to the present Plaintiff, in which, though the annuity was nearly seven years in arrear, he assigns merely the arrears and the securities for the same, without any mention of interest.

If, upon the second part of the argument, namely, that, if the annuitant had pursued his remedy at law, he might have obtained interest, and that he ought therefore to be allowed it in equity, it be meant that the deed gave him at law a right to interest, that is answered by the observations I have made upon the deed itself. But if it be meant that, if the annuitant or his trustee had obtained possession under the powers in the deed, this Court would not have relieved the grantor against such possession without payment of interest upon the arrears, that argument is answered by the fact, that the grantor, or those who derive title through him, are not in this suit seeking any such relief; that the grantee never did avail himself of his legal remedies, but is now applying to this Court for relief; and the authorities shew that in such a case this Court does not give interest upon arrears of annuities.

Upon this subject *Robinson* v. *Cumming* (*a*) is precisely in point. That was the grant of an annuity to a stranger,

(*a*) 2 *Atk.* 409.

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stranger, who had by his deed a right to enter, and to hold till all arrears, costs, and damages, were satisfied. Lord *Hardwicke*, however, held that he was not entitled to interest, and said that there was no instance in which the Court had allowed interest upon the arrears of such an annuity, although, if the annuitant had entered and been in possession of the estate, the Court would not have obliged him to quit possession, unless the grantor had agreed to allow him interest on the arrears of the annuity.

In *Newman* v. *Auling* (*a*) Lord *Hardwicke* allowed interest, but upon the ground that it was for the maintenance of a wife; and in *Tew* v. *Earl of Winterton* (*b*), in which that case was cited, Lord *Thurlow* did not seem disposed to follow it, but fully confirmed the general rule, as did Lord *Rosslyn*, shortly afterwards, in *Creuze* v. *Hunter*. (*c*) No subsequent case has been cited in any respect breaking in upon the general rule. The observations of the Master of the Rolls upon *Gay* v. *Cox* (*d*) and *Power* v. *Bennis* (*e*), in *Ridgeway*, dispose satisfactorily of those two cases; and, being of opinion that there is nothing in the deed to support the claim, I must necessarily come to the conclusion that, upon this first head, namely, the right of the annuitant, independently of the judgment, he is not entitled to interest upon the arrears; and that the decision of the Master of the Rolls upon that point is correct.

The second ground upon which interest is claimed is that there are judgments in a penal sum, given to secure the annuities; and that the annuitant, if he had proceeded upon the judgments, might have recovered interest

(*a*) 3 *Atk.* 579.
(*b*) 1 *Ves.* jun. 451.
(*c*) 2 *Ves.* jun. 157.
(*d*) 1 *Ridge.* 153.
(*e*) 2 *Ridge.* 236.

interest in the shape of damages. Now it is in the first place to be observed, that by the annuity deed satisfaction is to be entered up on the judgments on payment of the arrears, "and all such costs, charges, and expenses as aforesaid;" and that it is not the party liable to the judgment, but the annuitant, who is applying to this Court. The judgment is not given for a debt due, but to secure the performance of the contract; and the annuitant never used that remedy for that purpose. He has preferred this Court; and must, therefore, rest satisfied with that which the practice of this Court will give. It is quite clear that the general rule in this Court is not to allow interest upon judgments, in administering assets. From *Deschamps* v. *Vanneck* (*a*) to *Gaunt* v. *Taylor* (*b*), no doubt appears to have existed upon this point; and yet, in all cases of judgments, actions might have been brought upon them, in which damages in the nature of interest might possibly have been recovered. In *Bedford* v. *Coke* (*c*) the annuitant had a judgment; but Lord *Hardwicke* refused to give interest.

In this case the creditor has failed in his attempt to prove that he has been delayed by the absence or conduct of the debtor: the Court has not interfered with his legal right; and the original debt did not bear interest. Under such circumstances, there is no authority for allowing interest upon the judgment. In *Morgan* v. *Evans* (*d*) the House of Lords, reversing a decision of the Court of Exchequer, allowed interest upon a judgment: but in that case the original debt carried interest; and the Court deprived the creditor of the possession of the estate. The case of *Ogilvie* v. *Foley*

(*a*) 2 *Ves.* jun. 716.
(*b*) 3 *Mylne & Keen*, 302.
(*c*) 1 *Dick.* 178.
(*d*) 8 *Bligh*, 777. *N. S.*

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*Foley* (*a*) seems to shew that the annuitant could no have recovered interest by way of damages upon hi judgment in this case; although that is not the groun upon which my decision proceeds. I am therefore o opinion, that the judgments do not entitle the Plaintif to interest; and this disposes of all those annuities no charged upon the estates.

It was then said that the money applicable to th payment of the arrears of these annuities had been i Court, and productive; that it was the Plaintiff's fund and that, consequently, he was entitled to what it ha produced. This claim, however, was answered, and I think satisfactorily, by the fact that the money was no paid into Court in the suit of the annuitant, or upon hi application; and cannot therefore, in any way, be con sidered as his fund.

This disposes of the appeal against the decree There remains to be considered the Order of the 3d o *March* 1837, of which the Plaintiff complains in so far a it orders him to execute releases and re-assignments o the annuities specifically charged, and to enter up satis faction upon the judgments in *England* and in *Irelan* given to secure them, and restrains him from prosecutin his suit in *Ireland*.

The order proceeds upon the ground that the tot amount of what the Plaintiff is entitled to in respect these annuities and the incidental charges had be ascertained, and funds appropriated for the payment the amount; and it is only upon payment of all that h been so found due that the Plaintiff is to comply wi these directions. The Plaintiff comes into equity obta

(*a*) 2 *Blackst.* 1111.; and see 2 *Tidd*, 1183. 9th ed.

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obtain payment of a demand. He receives all that the Court adjudges him to be entitled to; and it is quite of course to require him to give up and surrender the securities which he held for such demand. Whether he would or would not have got more if he had at first proceeded in *Ireland* is immaterial. This Court, to which he thought it expedient to apply, decides that what he is directed to receive is the whole to which he is entitled, and will not, therefore, permit him to retain, for the purpose of using elsewhere, securities upon which, according to the judgment of the Court, nothing remains due. As to this, *Rigby* v. *M'Namara* (*a*) is in point.

The result of the whole is, that in my opinion the judgment of the Master of the Rolls is right in all its parts, and that the appeal must be dismissed with costs. (*b*)

(*a*) 2 *Cox*, 415.

(*b*) See now, as to interest on judgments, the act 1 & 2 *Vict.* *c.* 110. *s.* 17.

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In the Matter of the 4 *G.* 4. *c.* 76. *May* 24. 26.

*Ex parte I. C.*, an Infant.

THIS was a petition presented under the 4 *G.* 4. *c.* 76., on the part of a female infant of the age of eighteen years, stating that she had received eligible proposals of marriage, but that her father, unreasonably or from undue motives, refused his consent, and praying that the Lord Chancellor would make a judicial declaration that the proposed marriage was proper, with a view to its being forthwith solemnised.

The provision in the seventeenth section of the Marriage Act (4 *G.* 4. *c.* 76.) does not apply to the case of a father who is beyond the seas, or unreasonably withholds his consent, but only to a case in which he is *non compos mentis.*

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Mr. *Wigram* and Mr. *Stuart*, for the petition.

The question turns solely upon the construction of the marriage act, the 4 *G.* 4. *c.* 76. The sixteenth section of that statute requires the consent of the father, if living, to the marriage of any party under twenty-one years of age, such party not being a widower or widow: and in case this provision is violated, the father, by the twenty-third section, is empowered to sue for a forfeiture of all the estate and interest, in any property, which has accrued or shall accrue to the offending party by force of such marriage, without the required consent. The seventeenth section enacts, that "in case the father or fathers of the parties to be married, or of one of them so under age as aforesaid, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them, whose consent is made necessary as afore- said to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably or from undue motives refuse or withhold his, her, or their consent to a proper marriage, then it shall and may be lawful for any person desirous of marrying, in any of the before mentioned cases, to appl- by petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain*, for the time being, Master of the Rolls, or Vice-Chancellor of *England*, who is and are respectivel- hereby empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall upon examination, appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commisssioners of the Great Seal, for the time being, Master of the Roll- or Vice-Chancellor, shall judicially declare the same to be so; and such judicial declaration shall be deemed an taken to be as good and effectual, to all intents an purposes, as if the father, guardian or guardians, mothe-

mother of the person so petitioning had consented to such marriage."

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It is submitted that, under this clause, the Lord Chancellor is authorised to substitute his judgment for that of the father, where the latter unreasonably, or from undue motives, withholds his consent, the father being, according to the language of the section, one of those "whose consent is made necessary as aforesaid to the marriage of such party." The Lord Chancellor has, therefore, jurisdiction to entertain the matter and inquire into the propriety of the proposed marriage, and an inquiry is all that this petition asks in the first instance. No reason can be suggested why a father who wantonly refuses his consent should be in a different situation from any other guardian. The Vice-Chancellor made a similar order some time ago in *Ex parte Cooper* (*a*), the case of a young lady under age, whose father was then residing in *India*, and not likely to return to *England*.

*The* Lord Chancellor said that, in his opinion, the words "any of them whose consent," &c., referred to the persons named in the immediately preceding member of the sentence, viz. "the guardian or guardians, mother or mothers:" and that the discretionary power of consent vested in the Judges of this Court, in case the consent should be withheld unreasonably, or from undue motives, applied exclusively to the case of such guardian or mother so acting. As, however, the point had been under the Vice-Chancellor's consideration, he should take an opportunity of conferring with His Honor upon it.

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*The*

(*a*) 19th *August* 1834.

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*Ex parte I. C.*
*May 26.*

*The* LORD CHANCELLOR said, he had seen the Vice-Chancellor on the subject of the construction to be put on the Marriage Act in this case. They had looked at the act together; and they were clearly of opinion that its provisions did not extend to the case of a father beyond seas, or unreasonably withholding his consent, but solely to the case of a father who was *non compos*. There could be no doubt that the order in *Ex parte Cooper* would not have been made, if the act had been properly brought under his Honor's attention at the time. The date of the order, being the 19th of *August*, afforded a very sufficient explanation of the circumstances under which that order was obtained.

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*May 26.*

## DOWNING COLLEGE Case.

Upon the taxation of costs, even as between solicitor and client, the rule is to allow only two counsel, or, under special circumstances, three.

ON the dismissal of the petition in this matter (a), the costs of all parties, taxed as between solicitor and client, were directed to be paid out of the funds of the College, as in the *Queen's College* case. (b) The Master, in taxing the costs, allowed the fees of the three Queen's counsel who appeared on behalf of the petition, but he disallowed those of the two other counsel on the same side, who were gentlemen behind the bar.

Mr. *Knight Bruce* appeared in support of a petition praying that the Master might review his taxation on that point. The assistance of the junior counsel, he submitted, had been of essential service in the conduct of the argument. He was unable to refer to any case in which the

(a) See 2 *Mylne & Craig*, 642. (b) See *Jac.* p. 47.

the fees of more than three counsel on a side had been allowed on taxation; but as three counsel within the bar were retained in support of the petition, whose fees had all been allowed, it seemed that one of them might have been more properly struck off than the two juniors.

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DOWNING College Case.

*The* LORD CHANCELLOR inquired what number of counsel on the other side the Master had allowed.

Mr. *Knight Bruce* said that three were allowed, all of whom were counsel within the bar.

*The* LORD CHANCELLOR was of opinion that the Master had come to a proper conclusion. A suitor might employ as many counsel as he pleased; but when the costs were ordered to be taxed, although as between solicitor and client, the rule was to allow only two counsel, or three, under special circumstances.

## FOLEY *v.* HILL.

*June* 22, 23.

THE bill, which was filed in *January* 1838, stated, in substance, that, in the month of *April* 1829, the Defendants carried on business in copartnership as bankers, at *Stourbridge*, and that, on the 11th of *April* in that year, the Plaintiff opened a banking account with them, by causing a sum of 6117*l.* 10*s.* to be paid into their bank on his account, for which the Defendants gave him their accountable receipt: that divers sums continued from time to time to be paid, and divers cheques to be drawn by the Plaintiff and his agents on such account, during the successive years 1831, 1832,

Where a bill charges matters which, if true, would destroy an anticipated legal bar, a plea, setting up that bar, will be over-ruled, unless it is supported by an answer which fully negatives those matters.

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1833, and 1834, which sums and cheques were duly entered and noted in the Defendants' banking books, and to the Plaintiff's account: that interest accrued on the balances from time to time due on such account, and was duly entered or credited to the Plaintiff in the said account; and that, during the whole of the aforesaid period, a very large sum was due to the Plaintiff on the balance of such account. It then alleged, that the Plaintiff, being desirous to close his account with the Defendants, made applications to them to render a statement of their receipts and payments on his account, and of the interest accruing on the balance; but that they refused, under the pretence that no entries had been made to or on account of the Plaintiff's account within six years then last past, and that no written acknowledgment of the existence of any such account, and no written promise to pay the balance thereof, had been signed by the Defendants, or any member of their firm, since the accountable receipt of *April* 1829, and that the claim was barred by the Statute of Limitations.

The bill then contained a variety of special charges all tending to shew that the Defendants had, by their own acts, and by entries and statements, made within the six years, and down to a very recent period, in their partnership books and accounts, and balance sheets, treated and admitted the Plaintiff's claim as a subsisting debt due from them to him. The bill further charged, that various letters and written communications had within the six years, passed between the Defendants and their solicitor, and other persons, relative to the matters mentioned in the bill, and wherein the existence of the Plaintiff's claim as a subsisting debt was stated or admitted; and that, in the banking books and balance sheets of the firm, there were various entries and memoranda referring to or including the sum of 6117*l.* 10*s.*, and the

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other monies received on the Plaintiff's account, or the balance due in respect of such account, and that by such entries and memoranda the truth of the matters therein stated and charged would appear. The bill also contained the usual charge as to the possession of books, accounts, papers, vouchers, &c., and called upon the Defendants to set out, in a schedule, a true and correct list of them.

The bill prayed an account and payment of the balance due upon the Plaintiff's banking account.

To this bill two of the Defendants put in a joint and several plea and answer, whereby to all the discovery and relief sought by the bill, — other than such parts of it as sought a discovery by means of the interrogatories founded on the allegations and charges introduced for the purpose of shewing that the Defendants had, within six years, admitted or treated the demand as a subsisting debt (which excepted parts were specifically set out) — the Defendants pleaded the Statute of Limitations. They then went on, by answer, to deny, *seriatim*, a considerable portion of the special charges with respect to the alleged transactions as amongst themselves, and between themselves and other persons, on behalf of the Plaintiff, relative to his claims, within the six years last past: but they did not fully answer the charges upon that point, and in particular they omitted to make any answer to the charges relating to entries in the partnership books and balance sheets, to admissions or statements in communications with other persons, and to the possession of books and papers touching the matters in question in the cause.

This plea was set down, and came on for argument before the Vice-Chancellor, on the 5th of *May* 1838, when his Honor, on the ground that the Defendants

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had not fully answered such parts of the bill as were excepted from the plea, and as they purported to answer, made an order over-ruling the plea. The Defendants now appealed against that order.

The *Solicitor-General* and Mr. *Armstrong*, in support of the appeal.

The alleged insufficiency in the Defendants' answer consists principally in this, that they do not thereby deny that they have written letters within six years acknowledging the Plaintiff's debt, or that they have in their custody or power documents, papers, and accounts relating to the matters in question, and by which the truth of the charges in the bill would appear. But what we contend is that, upon the argument of the plea (and here the case comes before the Court simply upon the plea), the Court has no right to look at all into the answer, for the purpose of judging whether it is sufficient or not. Our plea is a perfectly good plea if it be true; but when a party has set down a plea to be argued, the sole question is whether, assuming it to be true, it is a valid defence to the demand. In a plea, two matters are to be considered; first, its validity as a defence, if true; and, secondly, its truth. The former is purely a question of law, the latter, of fact; and with a view to the trial of the latter, the Plaintiff, by excepting to the answer, may obtain the further discovery which he requires.

*The* LORD CHANCELLOR.

I understand your proposition to be that the plea would be good, although there was no answer to support it. Suppose a plea of purchase for valuable consideration without notice, to a bill which charged particular acts equivalent to or inferring notice, would it not be necessary to deny those charges by the answer?

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The *Solicitor-General.*

The Plaintiff is entitled to except to the answer, and so may get a full discovery. This answer I admit is open to exception. The Vice-Chancellor's judgment went upon the ground, that there were particular charges in the bill, which were excepted from the plea for the purpose of being answered, and were not pleaded to, and which, nevertheless, were not fully answered. But if his Honor's decision be correct, where is the line to be drawn? The only possible object of such an answer is to prove the truth or untruth of the plea. The bill states certain facts, shewing that the matter of the plea does not exist. As to those facts, the Plaintiff has a right to call for an answer; but such answer is not to be looked at for the purpose of seeing whether the plea is or is not a good plea in law, although it may conclusively establish that the plea is untrue in fact. No case exactly involves or decides this point. The question, however, is glanced at incidentally in an anonymous case in *Atkyns* (*a*), a case referred to by Lord *Redesdale* (*b*) in the passage of his *Treatise on Pleading* where his Lordship considers the subject. The conclusion at which his Lordship arrives (*c*), however, is not reconcilable with principle, and seems at variance with the doctrine laid down by Lord *Eldon* in *Bayley* v. *Adams.* (*d*) The cases of *Pope* v. *Bish* (*e*) and *Edmundson* v. *Hartley* (*g*) cannot be law.

*The* LORD CHANCELLOR.

If facts which, if true, would destroy the plea are left untouched by the answer, I certainly never have supposed they could be safely so left. What you neither plead

(*a*) 3 *Atk.* 70.
(*b*) p. 271. 4th ed.
(*c*) See pp. 256. 298.
(*d*) 6 *Ves.* 586.
(*e*) 1 *Anst.* 97.
(*g*) 1 *Anst.* 59.

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plead to nor answer, you admit. So that what the Court would be doing would be to say, here is a very good defence, and here, at the same time, is a fact admitted which destroys it as a defence.

The *Solicitor-General.*

The principle seems to resolve itself into this, that what the Plaintiff is entitled to, he is entitled to in the shape of discovery, to enable him to rebut the truth of the plea, when that comes to be controverted; but that, as the truth of the plea cannot possibly come in question upon the argument as to its validity, the Court, in this stage, has no right to inquire into the sufficiency of the discovery. This is the view which seems to have been taken by Mr. *Wigram* in his "*Points in the Law of Discovery.*" (*a*) *Sanders* v. *King* (*b*), *Thring* v. *Edgar* (*c*), *Cork* v. *Wilcock* (*d*), *M'Gregor* v. *East India Company* (*e*), *Lord Portarlington* v. *Soulby.* (*g*)

*The* LORD CHANCELLOR.

The bill in this case is founded upon the principle of anticipating a legal bar in the shape of a plea of the statute of limitations; and, with that view, it introduces, in the usual way, a charge, which, if true, would remove the bar, by preventing the operation of the statute. That is the neat statement of the point, and it certainly raises a question applicable, not only to the statute of limitations, but to every case where a charge is to be found in a bill, which, if true, would remove an expected legal bar. The Defendants plead the legal bar. No objection is taken to the averments of the plea; but the objection is that the allegation, which, if

(*a*) Page 185.
(*b*) 6 *Mad.* 61.
(*c*) 2 *Sim. & Stu.* 274.
(*d*) 5 *Mad.* 528.
(*e*) 2 *Sim.* 452.
(*g*) 6 *Sim.* 356.

if true, meets the bar, and is very properly excluded from the plea, is not answered. The answer does not, in terms, negative that allegation; and the argument is that, under these circumstances, the Court must adjudicate upon the plea, and that the question whether that allegation be or be not true, although a material part of the case in order to try the truth of the plea, is not a material circumstance upon the argument of the plea; in other words, that the Court would be bound to allow the plea, though there was no statement in the answer to destroy the effect of the allegation in the bill, introduced for the purpose of meeting and displacing the anticipated bar.

Now, independently of authority, and having been occasionally engaged in cases of this sort for upwards of thirty years, I have always considered it to be one of the best established principles of pleading that this could not be done. I have always understood that where a bill contained an allegation which would meet the legal bar, the Defendant could not plead the legal bar without negativing that allegation. That applies to all cases of this kind — to pleas of the statute of limitations, pleas of fraud, and so forth. Lord *Redesdale* lays down the rule very clearly. Lord *Eldon* not only lays it down, but rests his decision upon it in *Bayley* v. *Adams* (*a*); for the result of that case was, as appears from the marginal note and his Lordship's judgment, that the charges in the bill were not sufficiently answered, and the question was whether, under those circumstances, the plea was or was not to be allowed.

It was argued that, if the charge introduced for the purpose of meeting the plea has not been sufficiently answered,

(*a*) 6 *Ves.* 586.

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answered, the proper course is to take exceptions to the answer. That, however, is not so. The Plaintiff cannot except to the answer until after the argument on the validity of the plea; for, by excepting to the answer, he would admit the validity of the plea. (a) The reason of the rule is not very material; for we find it not only laid down by Lord *Redesdale* and Lord *Eldon*, but received as the universal rule in practice. The whole machinery of pleading in equity is somewhat cumbrous, and not quite well reduced to principle. At the same time we must recollect that the Plaintiff, by the mode of pleading he has adopted, furnishes himself with a special replication in the bill, if he anticipates the defence by introducing a charge which would meet it. If the Defendant had pleaded the statute, the Plaintiff, according to the old practice, would reply the matter here stated by way of charge. That would be a special replication, a course which is not now permitted; but the Plaintiff does that which is equivalent to it by framing his bill in the manner he has adopted here. Now the Defendant cannot plead to the whole of such a bill as that; for the legal bar is not the only question to be tried. There are two questions; first, whether the legal bar would apply; and secondly, if it would, whether it is not defeated by the circumstances charged in the bill for the purpose of meeting it. Then the Defendant puts in the plea, pleading his legal bar; and takes issue on that matter which is to deprive the legal bar of its effect. The Court requires that he should meet that allegation in the bill, which, if true, would shew that the bar ought not to prevail; otherwise the Court would be deciding upon the legal bar without the advantage of the Plaintiff's oath as to whether there was not something in the case which would make that legal bar inoperative.

(a) *Red. Pl.* 317. 4th ed.

erative. The Court, therefore, requires that the endant should, at least to the extent of his oath, lge himself to the denial of that which, if true, ıld defeat the legal bar. These Defendants have ıded the legal bar; but they have left quite untouched charges introduced for the purpose of obviating that . It is a question which all authorities, and the uni- sal practice of the profession, have determined; and ıave no doubt, without hearing the counsel for the intiff, that the Vice-Chancellor's decision was right.

*The* LORD CHANCELLOR then said, in reply to an lication by the *Solicitor-General* for leave to amend answer, that he could not grant such leave; for ould be giving leave to put in a further answer, and ıld be, in effect, allowing the plea.

The *Solicitor-General* then asked leave to withdraw plea and answer.

*The* LORD CHANCELLOR.

have always refused to permit a party to withdraw answer. What is once on the record must always ıain there. Where a mere slip has been made, I am ious to relieve the party if I can: but, at the same e, I must adhere to the rules of pleading. If you ld effect your object by amending the plea, I might disposed to permit you to do so; but I cannot do at you wish, for the reason I have stated.

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Mr. *Jacob* and Mr. *G. L. Russell* were counsel for Plaintiff.

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*Nov.* 14. The ATTORNEY-GENERAL *v.* The Bailiffs and Burgesses of EAST RETFORD.

Where a decree has declared that a corporation is liable to make good the loss occasioned by a breach of trust, the Court will not specifically charge the loss upon the general corporate property; but will leave the Plaintiff to enforce his remedy by the usual process against a corporation. An order, therefore, contained in such a decree, directing inquiries into the corporate property and the special trusts to which it was subject, with a view to charge the loss upon such portions of that property as should not be subject to any special trust, was reversed.

THIS case is reported upon the hearing at the Rolls on further directions, in the second volume of Messrs. *Mylne and Keen's Reports*, p. 35., where the judgment is given from Sir *John Leach*'s own note.

The order then made, after declaring that the Defendants, the Corporation of *East Retford*, were liable to make good the value of the charity lands alienated by them in the year 1656, and directing an inquiry as to the present value of such lands, went on to order (among other things), that the Master should inquire and state to the Court of what property, real or personal, the corporation were seised or possessed on the 7th of *July* 1821, the day of filing the information; and whether such property, or any and what part thereof, was subject to any and what trust; and whether any and what part thereof had been sold or incumbered, and for what considerations, or to what amount, since the filing of the information; and the Master was to be at liberty to state circumstances specially as to the last-mentioned inquiry: and for the better taking of the said account and discovery of the matters aforesaid, the corporation, their chamberlain or town-clerk, were or was to be examined upon interrogatories; and to produce, on the oath of the chamberlain or town-clerk, all books, papers, and documents, in their custody or power, relating thereto, as the Master should direct, &c.

The

The Defendants, the Corporation of *East Retford*, appealed against this part of the order.

Mr. *Barber* and Mr. *Stuart*, in support of the appeal.

The order complained of proceeds upon the principle of lien or trust, though no such case was established by the evidence, or even alleged upon the information. The case was that of an ordinary breach of trust, which constitutes no more than a simple contract debt. In such a case the jurisdiction of the Court is only *in personam*; and the fact that the debtors are a corporation, and therefore not capable of being proceeded against personally, cannot alter the nature of the liability, or give the informant a better remedy by entitling him to go at once, *per saltum*, against the other lands of the Corporation, instead of resorting to the usual means of enforcing payment; 4 *Inst.* 84., *The Attorney-General* v. *The Corporation of Exeter* (*a*), *Daniell's Chancery Practice.* (*b*)

The *Solicitor-General* and Mr. *Blunt*, for the informant, and Mr. *Skirrow* and Mr. *Walker*, for the personal representative of the school-master (who had died since the filing of the original information), in support of the order.

There are two questions; first, whether, consistently with the principles and practice of the Court, such an inquiry as has been directed here ought, under any circumstances, to be directed; and, secondly, whether that inquiry is expedient in the present case. With respect to the first and more important point, a similar order was made in the case of *The Attorney-General* v. *The Corporation of Exeter* (*c*); and, although that order was

(*a*) 2 *Russ.* 45.; and 3 *Russ.* 395.

(*b*) 2d vol. 252, 253.

(*c*) 2 *Russ.* 45.

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was afterwards varied on appeal, the grounds upon which Lord *Eldon* considered it to be erroneous do not at all affect the question. Under the peculiar circumstances of the case, his Lordship thought such an inquiry inexpedient (*a*); but he no where expresses any disapprobation of the principle of the order. Here the decree (unlike that in the *Exeter* case) has conclusively established it as a fact that something is due from the Corporation. Lord *Eldon*'s authority, therefore, instead of being adverse, is in our favour. The property to be affected by the inquiry is not held upon any special trust, and it would be liable to the general debts of the corporation, under the ninety-second section of the Municipal Reform Act. (*b*) The order is framed agreeably to what has, for a number of years, been the ordinary course in the case of informations against corporations which have wasted or perverted their trust estates, and against which, from their incorporeal character, no process could be had *in personam*, for the purpose of enforcing the order. Similar decrees were made by Sir *John Leach* against the Corporations of *Newbury*, *Newark*, and *Totness*, and were submitted to without appeal. There are peculiar reasons in the present case why the inquiry should be directed; for it appears upon the pleadings, and is indeed found by the report, that a portion of the trust property, now sought to be recovered and restored to the charity, has been applied by the Corporation in redeeming the land-tax charged on their corporate property. Besides, a corporation stands on a different footing from an ordinary defendant; for it is necessarily subject to the control of the Crown, at the instance of the Attorney-General, whenever it misapplies the property which constitutes its foundation, and thereby defeats the very object of its institution;

(*a*) See 2 *Russ.* p. 55. (*b*) 6 *Will.* 4. *c.* 76.

tution; *The Attorney-General* v. *The Corporation of Dublin.* (*a*)

*The* LORD CHANCELLOR.

The counsel who have had to support the part of the order under appeal, sensible that they could not maintain it upon any principle, have relied upon the special circumstances of the case. Those are, first, that the property sought to be affected by the order was Crown property, and was conveyed by the Crown to the Corporation, and that the Corporation has failed to execute the purposes for which it was bestowed. That may be so: and, if it be, the Crown, undoubtedly, will have its appropriate and peculiar remedy against the Corporation. But such is not the form or object of the present proceeding before me. The other circumstance relied on is, that the property alleged to have been improperly alienated has been expended or invested in relieving other property of the Corporation from the burden of the land-tax. If the informant has any such case to make, it is for him to have the cause reheard, and the decree varied with that view; for in its present form the decree does not give any such relief, nor was any such case made by the information. The case of *The Attorney-General* v. *The Corporation of Dublin* (*a*) has been cited, as if that were an authority applicable to the present; but I find no such direction there as is contained in this order. On the contrary, the inquiry there directed was strictly confined to the property which was the subject of the trust.

The case comes back, therefore, to the general question, whether in a suit against a corporation, where a certain

(*a*) 1 *Bligh*, 312. *N. S.*

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certain payment is found to be due from the corporation, this Court possesses, or is in the habit of exercising, jurisdiction over property of the corporation, which is not the subject-matter of the suit, in administering that which is its subject-matter. The first consideration is, what distinction is made in this decretal order between the property on which a lien exists, and the property on which no lien exists. This is exactly the order which would have been made if the property had been the subject of a lien or specific trust. But the property to be affected by these inquiries is quite foreign to the trust, and includes all the corporate property; and the effect of working out the order in the Master's office would be, that all the corporate property, of whatever description, would have to be examined into and scrutinized. The order, in truth, confounds two things. It seeks to affect as subject to a lien that which is subject to the demand only through the process of the Court.

There are difficulties, it is true, in compelling a corporation to obey a decree of this Court. But precisely the same consequences follow in the case of such Defendants as have privilege of parliament: and if this order were suffered to stand, it would be impossible upon principle to refuse a similar advantage in their case, or in any case in which the only compulsory process is sequestration. I am surprised to learn that a decree in this form has been made in so many instances; opposed as it is to the principles and general practice of the Court. But I certainly am not surprised that, when it was called to the attention of Lord *Eldon* and Lord *Lyndhurst*, it was not sanctioned by them. No one conversant with the mode in which Lord *Eldon* was in the habit of expressing himself can suppose that his Lordship entertained any doubt that the

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jurisdiction here asserted could not be maintained. Lordship, in *The Attorney-General* v. *The Cor-ion of Exeter*, expresses himself thus: — "The t is not ignorant of the means of enforcing a e against a corporation. But I entertain great ıtion in giving my assent to an order calling upon poration or an individual to expose to the world articulars of their property, and the purposes to ı it is applicable; especially when such an order is npanied, as in the present case, with a direction to uce deeds and papers. The result of the other ries may be, that the corporation is not chargeable e extent of a single shilling, so that the disclosure be altogether unnecessary for the purposes of this and yet might be prejudicial to the Defendants in points of view. That part of the decree cannot ." (*a*) There the observation, that in the result might be no demand, is quite general.

on a re-argument of the appeal before Lord *Lynd-* his Lordship, in affirming the Vice-Chancellor's e, excepted that part of it which directed the er to inquire what property the corporation had, :able to general corporate purposes. "That part e decree," observed his Lordship, "which directs quiry into the property of the corporation, and s to the production of their title deeds, must be ed. If there were any evidence that the fines paid e last renewals had been applied to the public orporate purposes which have been mentioned, I not direct any inquiry concerning them. But I no such evidence." (*b*)

Thus

(*a*) 2 *Russ.* p. 55. (*b*) 3 *Russ.* p. 398.

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Thus two successive Lord Chancellors have considered that this was an inquiry which the Court had no jurisdiction to direct. The order under appeal, therefore, stands on the single authority of two or three decisions of Sir *John Leach*, which have been acquiesced in; and, with all deference to the opinion of that eminent Judge, it is impossible to put his authority in competition with that of the great men I have referred to. There can be no doubt that the inquiry is not in conformity either with the practice or principles of this Court.

The appeal must be allowed.

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1837. *Nov.* 24, 25.
1838. *Nov.* 17.

## CLOUGH *v.* BOND.

On the death of an intestate, administration to her estate was granted to her son and daughter. The daughter being then under coverture, the assets were, in *May* 1831, paid into a banking house, to the joint account of her husband and her brother, the administrator; and the whole of the fund, with the exception of the share of one of the next of kin, who was abroad, was soon afterwards paid away among the several parties entitled, by means of cheques signed by the two persons in whose names the account stood. The husband of the administratrix died in *Dec.* 1831, and, ten months afterwards, her brother and co-administrator drew out the balance, and, having applied it to his own use, absconded: Held, that the estate of the husband of the administratrix was answerable for the loss.

Whether the administratrix was not also personally liable, *quære*?

*ANN DIXON* died in the month of *November* 1829, leaving certain testamentary papers, but intestate as to the bulk of her personal estate, which, therefore, became distributable among her next of kin, who were very numerous. Letters of administration, with the testamentary papers annexed, were granted to her two surviving children, *Emily Bond*, then the wife of *John Bond*, and *Thomas Reup Dixon*. The residuary estate consisted chiefly of government stock. This stock was

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sold in the month of *May* 1831, and, with a view stribution among the several persons entitled, the eeds, to the amount of about 18,000*l.* were paid into banking house of *Child* and Co., and there placed account in the joint names of *John Bond* and *Thomas Dixon*. At the same time it was arranged that all ues drawn on *Child* and Co. upon that account ld be signed by both the parties in whose names the stood. In the course of a few months afterwards, whole of the respective shares of the next of kin duly paid or provided for, by means of cheques n in that form, except the share of *Louisa Revell gh*, the wife of *John Clough*, who, with her husband, then expected very shortly to return from *India*. value of Mrs. *Clough*'s share, being one eighteenth he clear fund, amounted, after deducting the duty costs, to 988*l.* 6*s.* 8*d.*; and this sum, together with ther sum reserved to answer the expenses of administration, and making a total of 1348*l.*, remained he hands of *Child* and Co., upon the joint account, n to the death of *John Bond*, which happened on the of *December* 1831. In the months of *October* and *mber* in the following year, *Thomas Reup Dixon* out, by cheques, the balance of the account at *d*'s, and applied the money to his own use; and tly afterwards he absconded and left the kingdom.

Mr. and Mrs. *Clough* did not arrive in this country *India* until the end of the year 1834. Soon after r return they filed the present bill, praying for an unt of *Ann Dixon*'s personal estate, and for payt of Mrs. *Clough*'s share of the undisposed of residue; praying also that the Defendant *Emily Bond*, and other Defendants, the personal representatives of *Bond*, might be declared liable for any loss sused through the default or misconduct of *Thomas*

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*Reup Dixon*, who was also a nominal Defendant, though out of the jurisdiction.

The decree of the Vice-Chancellor, made at the hearing of the cause, after directing a general account of the estate, and an account of Mrs. *Clough*'s share, went on to declare that the Defendants, the personal representatives of *John Bond*, were personally chargeable with the sum of 1348*l.*, admitted by their answer to have been drawn out of *Child*'s bank by *Thomas Reup Dixon*, together with interest at 4*l.* per cent. upon that sum from the time when the same was so drawn out. And it reserved the consideration of the question, how far the Defendant *Emily Bond* was answerable for the said sum, until the Master should have made his report.

The Defendants, *Emily Bond* and the personal representatives of *John Bond*, appealed against this part of the decree.

Mr. *Jacob*, Mr. *Whitmarsh*, and Mr. *Whitmarsh* junior, for the appeal.

This is a case of extreme hardship, and carries the responsibility of executors to an unprecedented and pernicious extent. As *Emily Bond* was under coverture at the time of her mother's death, it was not only convenient, but proper, that the name of her husband, who was to act on her behalf in the joint administration with *Dixon*, should be substituted in the joint account for hers. It is not pretended that the sale of the stock and payment of the proceeds into *Child*'s bank were not proper acts; for, at or very soon after the time when they took place, the shares of the several persons entitled were payable, and were all actually paid, with the single exception of Mrs. *Clough*'s; and hers also

also would have been duly paid, had not she and her husband, who were then expected from *India*, changed their plans, and postponed their return home for three years. This appears from the correspondence which has been proved in the cause. So long as Mr. *Bond* lived, the estate had the security to be derived from his signing the cheques, and sharing in the responsibility jointly with *Dixon*. Upon his death, indeed, *Dixon*, as the survivor, acquired the legal control over the fund; but so *Dixon* would equally have done, if the account had been in the joint names of Mrs. *Bond* and himself, and she had died first — an event which was equally probable at the time when the account was opened. In substituting his own name in the account for that of his wife Mr. *Bond* was not guilty of any irregularity; it was an act in the ordinary course of business under such circumstances; and no loss was thereby occasioned to the estate during his lifetime. Upon what principle, then, can his representatives be made responsible for the acts of another, done after he ceased to be a trustee? Upon the death of Mr. *Bond* it was only reasonable and natural that his widow should leave every thing be managed by the person whose survivorship had given him the legal title. It appears, from her answer, that the first intimation she received of the balance having been drawn out, was by a letter from *Dixon* himself, representing to her, contrary to the fact, that he had invested it in exchequer bills on his own responsibility; and as the money had been lying unproductive at *Child*'s, and it was by that time known that the Plaintiffs were not coming home immediately, the representation was plausible and likely to deceive her. In short, throughout the whole transaction every precaution was taken for the safety of the estate which common prudence could suggest, and a court of equity, in drawing the line beyond which executors shall not be made

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answerable for losses, requires nothing more; *Bacon* v. *Bacon* (*a*), *Joy* v. *Campbell* (*b*), *Davis* v. *Spurling* (*c*), *Buxton* v. *Buxton*. (*d*)

Mr. *Wigram*, and Mr. *Walker*, in support of the decree.

The property has been deprived of its due protection through the conduct of Mr. *Bond* and his wife; and a loss having been sustained in consequence, the estate of the former, and the latter personally, are responsible for the loss; *Adair* v. *Shaw* (*e*), *Roper's Law of Husband and Wife*. (*g*) If they had acted regularly, Mrs. *Bond*'s name would have been joined in the account with those of her husband and *Dixon*; or, at all events, immediately upon her husband's death, she should have taken steps to regain a control over the fund; and in either case the fund would have been safe. The principle of the Court is to charge persons in the situation of trustees as parties to a breach of trust, wherever they have acted irregularly, and the irregularity, however well-intended, has in the result enabled their co-trustees to commit a breach of trust, or has been, however remotely, the origin of the loss; *Lord Shipbrook* v. *Lord Hinchinbrook* (*h*), *Macdonnell* v. *Harding* (*i*), *Salway* v. *Salway* (*k*), *Moyle* v. *Moyle*. (*l*)

Mr. *Jacob*, in reply.

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*The* LORD CHANCELLOR.

The facts of this case are short and simple. The question raised upon them is important in principle, but, in my opinion, not difficult of solution.

The

(*a*) 5 *Ves.* 331.
(*b*) 1 *Scho. & Lef.* 328.
(*c*) 1 *Russ. & Mylne*, 64.
(*d*) 1 *Mylne & Craig*, 80.
(*e*) 1 *Scho. & Lef.* 243.
(*g*) By *Jacob*, vol. i. 196-7.
(*h*) 11 *Ves.* 252.
(*i*) 7 *Sim.* 178.
(*k*) 2 *Russ. & Mylne*, 215.
(*l*) 2 *Russ. & Mylne*, 710.

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The Plaintiffs are, under the will of *Ann Dixon*, or, rather, as her next of kin, entitled to an interest in her personal estate. Letters of administration of the estate of *Ann Dixon*, with her will annexed, were, in the year 1829, granted to *Thomas Reup Dixon* and *Emily Bond*, then the wife of *John Bond*.

In the month of *December* 1831 *John Bond* died, and the Appellants are his widow and personal representatives.

In *October* 1832, and in the following month, *Thomas Reup Dixon* drew out from Messrs. *Child* and Co. a sum of money, part of *Ann Dixon*'s estate, which has not been recovered from him, and is lost to the estate; and the question is, whether the estate of *John Bond* is liable to make good the loss by replacing that sum. His personal representatives, by their answer, admit the joint possession of the property by *Thomas Reup Dixon* and *John Bond*, with the consent of *Emily Bond*, and that the balance was paid into *Child*'s, in the joint names of *Thomas Reup Dixon* and *John Bond*; and that it was agreed between them that all drafts should be signed by them both.

Some attempt was made in the answer and by the evidence to set up a settlement with *Dixon*; but the attempt did not succeed in shewing any settlement of the demand in question.

The ground upon which the Plaintiffs support the claim against the estate of Mr. *Bond* leaves his character for integrity unimpeached; and, if successful, will certainly prove a hard case against those interested in his estate. It is this; — that the payment of the money into *Child*'s, in the names of himself and of Mr. *Dixon*,

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was not a correct discharge of the duty which he owed to the estate; and that, as the effect of such payment has been to give Mr. *Dixon* the control over the fund by which the loss has arisen, his estate is responsible.

It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorised, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable; *Phillips* v. *Phillips* (*a*); or if he leave money due upon personal security, which, though good at the time, afterwards fails; *Powell* v. *Evans* (*b*), *Tebbs* v. *Carpenter*. And the case is stronger if he be himself the author of the improper investment, as upon personal security, of an unauthorised fund. Thus, he is not liable, upon a proper investment in the 3 per cents., for loss occasioned by the fluctuations of that fund; *Peat* v. *Crane* (*d*); but he is for the fluctuations of any unauthorised

(*a*) *Freem. Ch. Ca.* 11.
(*b*) *5 Ves.* 839.
(*c*) 1 *Madd.* 290.
(*d*) *2 Dick.* 499. note.

authorised fund; *Hancom* v. *Allen* (*a*), *Howe* v. *Earl of Dartmouth*. (*b*) So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator; *Longford* v. *Gascoyne* (*c*), *Lord Shipbrook* v. *Lord Hinchinbrook* (*d*), *Underwood* v. *Stevens*. (*e*)

Applying these principles to the present case, the inquiry is necessarily confined to two points; first, was the payment into *Child*'s of the money in question, in the joint names of Mr. *Bond* and Mr. *Dixon*, a proper mode of deposit; and, if not, secondly, was the loss occasioned by such mode of deposit?

*Bond* had nothing to do with the estate, except as husband of the administratrix. During the coverture he was entitled to interfere in her right; but that authority was determinable with the determination of the coverture. In the event, therefore, which happened, of his death before his wife, her authority would remain to be exercised by herself alone, and so she would be enabled to control her co-administrator — a security to the estate of which he had no right to deprive it. By depositing the money in his own name and that of the co-administrator *Dixon*, he did exclude the administratrix from ever possessing this control, so far as affects the

(*a*) 2 *Dick.* 498.
(*b*) 7 *Ves.* 137.; see p. 150.
(*c*) 11 *Ves.* 333.
(*d*) 11 *Ves.* 252. 16 *Ves.* 477.
(*e*) 1 *Mer.* 712.; and see *Hanbury* v. *Kirkland*, 3 *Sim.* 265.

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the funds in question, and in the event of *Dixon*'s death before him, gave to himself the absolute power over it; and in the event, which has happened, of his dying first, enabled *Dixon* to appropriate it to himself without the control of his co-administratrix. This mode of deposit, therefore, was an act by which, without necessity, one of the personal representatives was excluded, who had at one time possession, and by which exclusive possession was likely to vest in a person not entitled to it; and that event having happened, and such person having, by virtue of such possession, appropriated the fund to himself, there can be no doubt that the deposit was improper, and that it has been the cause of the loss. The principle, therefore, of the cases referred to subjects *Bond*'s estate to the liability of making good this fund; for although the wife was the personal representative, and she survives, yet the *devastavit* consisted in the improper deposit, which took place during the coverture; the money lost was part of the estate which came to the hands of the husband, and from which nothing has taken place that can discharge him. He was himself the author of the *devastavit*, and his estate is liable, as is fully illustrated by Lord *Redesdale* in *Adair* v. *Shaw*. (*a*)

I have therefore no difficulty in dismissing the petition of appeal, with costs.

I find that the decree adopts the statement of the sums as set out in the answer, with which I presume all parties are satisfied, as none have complained of that part of the decree. I cannot, however, but observe, upon the apparent inconsistency of adopting these sums, and particularly of declaring that the 988*l.* 6*s.* 8*d.* formed

(*a*) 1 *Scho. & Lef.* 243.

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CLOUGH v. BOND.

ormed the share or part of the share of the Plaintiff in he residue of the estate, and at the same time directing ie general accounts, and declaring that what shall be und due, including the sums in question, shall be plied in a due course of administration. But as that art of the case has not been brought before me, I only ention it for the purpose of excluding the supposition at, in dismissing the petition of appeal, I intend to press any opinion upon this part of the case.

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## FREAKE *v.* CRANEFELDT.

*Nov.* 17. 24.

A direction for the payment of debts, in a will of personal estate, will not stop the running of the statute of limitations.

If time has once begun to run against a debt in the debtor's life time, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted.

*CHARLOTTE BRADLEY*, otherwise *Prior*, by her will, dated the 21st of *September* 1822, directed payent of all her just debts and funeral and testamentary penses. She died on the 28th of *March* 1825, being at at time, and having for three years previous been, a isoner within the Rules of the King's Bench. In the onth of *March* 1833, administration with her will nexed was granted to the Defendant. In the month *August* following, the present suit was instituted by creditor, on behalf of himself and all other creditors the testatrix; and, on the 20th of *March* 1835, a decree was made, directing the usual account of debts. Under this decree, the personal representatives of a deceased creditor of the name of *Rouch* carried in a charge, in respect of a sum of 48*l.* 15*s.* 6*d.*, lent to the testatrix in the year 1821. To secure the debt and interest, the testatrix executed and gave to the creditor a warrant of attorney, dated the 30th of *May* 1821, to confess judgment for the sum of 100*l.*; but judgment was never signed upon the warrant.

The

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FREAKE v. CRANEFELDT.

The Master having allowed the charge, the Defendant excepted to his report. The exception was, in substance, that the debt was barred by the statute of limitations.

Mr. *Wigram* and Mr. *Ellison* appeared for the exception; Sir *W. Horne*, for the Plaintiff; and Mr. *Bilton*, for the personal representatives of *Rouch*, the creditor.

On the argument of the exception, three points were made.

In support of the charge it was contended, first, that the will created a trust to pay debts so as to take the case out of the statute; *Jones* v. *Scott*. (*a*) Secondly, that until administration was taken out, in the year 1833, there was no one against whom the creditor could proceed for his debt; and that, as the bill was filed in the same year, he was not barred by lapse of time; *Murray* v. *The East India Company* (*b*), *Douglas* v. *Forrest*. (*c*) Thirdly, that the warrant of attorney was in the nature of a specialty, so that the debt secured by it did not fall within the operation of the statute.

On the other side it was said, that *Jones* v. *Scott* had been very recently reversed in the House of Lords (*d*), and that the effect and principle of the reversal in that case was, that as to personal estate a trust for payment of debts was inoperative for any purpose; *Burke* v. *Jones*. (*e*) Upon the second point it was argued, that after time had once begun to run against a debt (as it had

(*a*) 1 *Russ. & Mylne*, 255.

(*b*) 5 *Barn. & Ald.* 204.

(*c*) 4 *Bing.* 686.

(*d*) *Scott* v. *Jones*, 16th *August* 1838. This case, on the appeal, will be reported in the 4th vol. of Messrs. *Clarke* and *Finelly's* reports.

(*e*) 2 *Ves. & B.* 275.

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had done here for the four years during which the testatrix lived after contracting the debt), it never afterwards was allowed to stop by reason of any intervening disability. The specific point which occurred here came very lately before the Court of Exchequer, in *Rhodes* v. *Smethurst* (*a*), and was decided, in conformity with that principle, against the claim. In the cases of *Murray* v. *The East India Company* and *Douglas* v. *Forrest* the statute had not begun to run, for the cause of action had not accrued in the debtor's life-time. It was perfectly competent to *Rouch* to have taken out letters of administration upon his debtor's death, and then he might have paid himself. With respect to the warrant of attorney, it was only the means of enabling the party to obtain a judgment; it was no ground of action, and did not of itself constitute a specialty; *Clarke* v. *Figes*. (*b*)

*The* LORD CHANCELLOR said he was disposed to allow the exception, as he entertained no doubt upon any of the points made. At the request of the counsel for the creditor, however, who desired to have an opportunity of ascertaining the circumstances under which *Jones* v. *Scott* had been reversed, he allowed the case to stand over for a few days.

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*Nov.* 24.

Mr. *Bilton* afterwards submitted, that the reversal, by the House of Lords, of the decree in *Jones* v. *Scott*, although it certainly decided that a trust of personal estate for payment of debts, created by will, did not prevent the statute from running, was not applicable to the present case, in which the debt, not having been barred

(*a*) 4 *Mees. & Wels.* 42. (*b*) 2 *Stark.* 254.

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barred at the time of the debtor's death — the period which, as Lord *Brougham* had observed, in *Jones* v. *Scott*, according to all principle and authority referen[illegible] was to be made — and there being no personal rep[illegible]sentative until *March* 1833, the six years only beg[illegible] to run from that time. The case of *Rhodes* v. *S*[illegible]*thurst* was a case at law, in which no notice co[illegible] be taken, even if they had existed, of the equitable c[illegible] cumstances which existed here. The testatrix, alm[illegible] from the time when she contracted the debt in questio[illegible] to the day of her death, remained a prisoner in the King's Bench, so that no action for the money could have been effectually prosecuted against her; and, as it was generally believed that she had died utterly insolvent, the creditor could not expect to get any thing but expense and loss by taking out administration to her estate.

*The* LORD CHANCELLOR said he was not at liberty to take into consideration these alleged equitable circumstances, upon the present proceeding. The expression cited from Lord *Brougham*'s judgment had been misapprehended; for it would be absurd to hold that, if the debtor died only a day before the six years were out, the creditor was then to have another period of six years within which to enforce his demand. The decision of the House of Lords, in *Scott* v. *Jones*, in which he entirely concurred with Lord *Lyndhurst*, was a direct authority for holding that a direction in a will for payment of debts was merely inoperative so far as the personal estate was concerned. The exception must be allowed.

1838.

## HILL *v.* GOMME.

*Nov.* 22.

A party aggrieved by an order made by the Master, under the 3 & 4 *W.* 4. *c.* 94. *s.* 15., in a cause set down at the Rolls, has no right to appeal to the Lord Chancellor against the order.

THIS was a motion, by way of appeal, from an order made by one of the Masters.

Sir *W. Horne* and Mr. *G. L. Russell* took a preliminary objection to the motion, on the ground that the cause had been set down at the Rolls; and that, in conformity with the 12th of the Orders of the 5th of *May* 1837 (*a*), no motion in such a cause could be brought on before the Lord Chancellor or Vice-Chancellor. That Order applied, in terms, to all interlocutory applications in a cause, and the present motion fell distinctly within that description.

Mr. *Wigram* and Mr. *Chandless, contrà*, referred to the thirteenth section of the Chancery Regulation Act (3 & 4 *W.* 4. *c.* 94.), by which the jurisdiction was given to the Master, and the right of appeal from him to the Lord Chancellor, Master of the Rolls, or Vice-Chancellor, whose decision was to be final; thereby taking away any further appeal. By that act, as a compensation for the loss of the right of further appeal, the aggrieved party was allowed to select the Judge who was to review the Master's decision; and such a privilege could not be affected or destroyed by an order of Court. This was not an interlocutory application within the meaning of the 12th Order, of *May* 1837, or one to which that order could ever be meant to apply.

*The*

(*a*) 2 *Mylne & Craig*, App. vi.

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HILL v. GOMME.

*The* LORD CHANCELLOR said that, upon the construction now contended for, if a party chose to bring the motion before him, he should have no power to send it to be heard by the Vice-Chancellor. The meaning of the statute was, that there should be an appeal to some one of the three judges. That was all that the section said; and a strict compliance with the provisions of the order was quite within the terms of the section, which only required that the Lord Chancellor, Master of the Rolls, *or* Vice-Chancellor should hear the application. It was obvious that, if Mr. *Wigram's* construction of the statute were to prevail, the effect would be to send, or at least to put it in the power of parties to bring, all the trifling motions of this kind, upon appeal from the Master's jurisdiction, to the Great Seal, — a result which could never have been intended. The act of parliament gave this jurisdiction, but it did not compel the Court to exercise it; and the twelfth general Order of *May* 1837 applied. He considered the objection to be well founded, and the application must, therefore, be dismissed with costs.

1838.

## RIGG *v.* WALL.

*Nov.* 24.
*Dec.* 4.

THE question in this case is stated in the judgment.

Mr. *Lloyd* appeared for the Defendant.

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*The* LORD CHANCELLOR.

The affidavit of service of *subpœna* to hear judgment produced by a Defendant when the Plaintiff makes default at the hearing, must verify the fact of the *subpœna* bearing the indorsement required by the third order of the 21st of *December* 1833.

When this cause was called on for hearing, the Plaintiff did not appear, and the Defendant produced an affidavit of service of *subpœna* to hear judgment, which was simply to the effect that he had been served with the *subpœna*, but did not state that the *subpœna* was endorsed with the name and residence of the solicitor who sued it out, in the manner directed by the third order of the 21st of *December* 1833. My impression at the time was, that it was impossible there could be one form of affidavit for verifying the *subpœna* in the case of a Plaintiff, and another form, in the case of a Defendant; and that it had already been determined in another case that the affidavit ought always to speak to the fact of the indorsement. I was met, however, by a representation that it was contrary to the established practice of the Court to require the fact of the indorsement to be verified in the case of a Defendant; and, as in all matters of this kind, that which has been considered as the practice deserves the utmost attention, I desired the Registrar to take the trouble to inquire, in order that I might ascertain how the practice really stood.

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Rigg v. Wall.

I have since received a written statement from Mr *Collis*, the Registrar, which is as follows: — "I have made inquiries respecting the affidavit of service of *subpœna* made by a Defendant, and am fully borne out in my opinion by a case which came on before the Master of the Rolls in *May* 1837. (*a*) His Lordship after hearing the arguments on both sides, consulted the Lord Chancellor and the Vice-Chancellor on the point, when it was determined that the affidavit to be made by the Defendant should be the converse of that required from a Plaintiff; containing the words '*with the indorsement thereon.*' The Six-clerks retained counsel to argue the point; but the opinion of the Judges decided the question."

That entirely confirms my own impression on the subject, although I did not, at the moment, recollect that the exact point had been previously submitted to me. The result is, that it has been a matter considered by all the three Judges of the Court, who have expressed their opinion that the affidavit produced by this Defendant was not such as, by the practice of the Court, is required. Hereafter it must be understood that the affidavit required to be produced by a Defendant, verifying the service of *subpœna* to hear judgment, must be such as is required to be produced by a Plaintiff.

(*a*) *Wolfe* v. *Rees*, 5th *May* 1837.

# REPORTS

OF

# CASES

ARGUED AND DETERMINED 1838.

IN THE

## HIGH COURT OF CHANCERY.

### STUBBS *v.* SARGON.

1838.
*Jan.* 24. 31.

A testatrix devised to trustees, their heirs and assigns, her copyhold

IN this cause several questions arose upon the will of Mrs. *Elizabeth Ives*. The material parts of the will and the questions which arose upon it are stated in

welling-house, garden, and ground, *together with the furniture and effects therein*, nd the coach-house and stable thereto belonging; and also the ten cottages, and wo new cottages built by her, with their appurtenances, at *L.*; to hold the same ith the appurtenances, unto and to the use of the trustees, their *heirs* and assigns, pon trust, that they or the survivors or survivor, or the *heirs* or assigns of the rvivor, should pay the rents, issues, and profits of *the said hereditaments* to *Sarah* ., wife of *George S.*, or otherwise permit and suffer her to use and occupy *the said ereditaments* during her life, to the intent that the same *hereditaments* and the nts, issues, and profits thereof might be for her sole and separate use, &c.; and ter her decease in trust for *George S.*, for his life; and after his decease upon trust at the trustees or the survivors or survivor of them, and the *heirs* and assigns of ch survivor, should be possessed of and interested in *the said hereditaments*, in ust for such persons, of a certain class, as *Sarah S.* should by will appoint and, in fault of appointment, upon trust, that the trustees or the survivors or survor of them, and the *heirs* or assigns of such survivor, should sell and dispose of *e said hereditaments and premises*; and the testatrix directed, that the produce of e sale should form part of her residuary personal estate: Held, that no beneial interest in the furniture and effects passed by the will.

The testatrix devised certain freehold premises, in which she carried on trade, trustees in fee, upon trust, (after the decease of a person to whom she gave the neficial interest therein for life), to dispose of and divide the same unto and nongst her (the testatrix's) partners, who should be in copartnership with her at e time of her decease, or to whom she might have disposed of her business, in such shares

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in the second volume of Mr. *Keen*'s reports (*a*), where will also be found a statement of the arguments used before the Master of the Rolls, and his Lordship's decision. An appeal from that decision, upon the first, second, and fourth of the questions stated in the report, was presented to the Lord Chancellor.

It should be mentioned that the terms in which the trusts declared of the property comprised in that part of the will upon which the first question arose — after the death of *George Sargon*—were these; viz. upon trust for that the trustees, or the survivors or survivor of them, *and the heirs and assigns* of such survivor, should be possessed of and interested in the said *hereditaments*, in trust for such one or more of the testatrix's nephews and nieces, or grand-nephews or grand-nieces, as *Sarah Sargon* should by will appoint; and in default of appointment, upon trust that the trustees, or the survivors or survivor of them, and *the heirs or assigns* of such survivor, should sell and dispose of the said *hereditaments and premises.*

It is proper also to state, that the testatrix gave her stock in trade, and the implements, utensils, carts, and horses used in her business, to her executors, upon trust for sale; but with liberty for her partners, or the person or persons who, at the time of her decease, should

shares and proportions as her trustees should think fit or* deem advisable.

The testatrix disposed of her business in her lifetime: Held, that the devise in favour of the persons to whom she might have disposed of her business, was not void, either under the Statute of Frauds, or on the ground of uncertainty.

The testatrix being entitled to the sum of 2000*l.*, secured by a promissory note which had two years to run, endorsed the note to *Sarah Sargon*, and sent it to her, with a letter in the following terms:—"The enclosed note of 2000*l.* I have given to Mrs. *Sarah Sargon* for her sole use and benefit, independent of her husband, for the express purpose of enabling Mrs. *Sargon* to present to either branch of my† family any principal or interest thereon, as the said Mrs. *Sarah Sargon* may consider the most prudent; and in the event of the death of Mrs. *Sarah Sargon*, by this bequest I empower her to dispose of the said sum of 2000*l.* and the interest, by will or deed, to those or‡ either branch of the family she may consider most deserving thereof. To enable Mrs. *Sarah Sargon*, my niece, to have the sole use and power of the said sum of 2000*l.* due to me by the above note of hand, I have specially indorsed the same in her favour." It being admitted that if this was a gift upon trust, the trust could not be executed: Held, that it was a gift upon trust, and that, as the trust failed, the sum secured by the note constituted part of the testatrix's estate.

(*a*) 2 *Keen*, 255.

* Sic. † Sic. ‡ Sic.

should be entitled to her freehold and leasehold premises under her will, to purchase the same at a valuation.

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It is also to be mentioned, that, by a circular letter of the 1st of *April* 1833, the testatrix notified to her customers her retirement from business, and recommended her surviving nephews, and the widow of her deceased nephew, Mr. *Innell*, as her successors. These persons were *Samuel Silver*, *Thomas Cooke*, *John Ives*, and *Ann Abigail Innell*, widow of *John Dialls Innell*. The testatrix died on the 17th of *April* 1833.

The arguments used upon the appeal were to the same effect as those which had been urged in the Court below.

Sir *C. Wetherell* and Mr. *Wakefield*, for the heiress at law.

Mr. *Spence* and Mr. *Walker*, Mr. *Tinney* and Mr. *Richards*, Mr. *Knight Bruce*, Mr. *Parker*, Mr. *Teed*, Mr. *Rogers*, Mr. *Bethell*, and Mr. *Hill*, for other parties.

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*The* LORD CHANCELLOR.

*Jan.* 31.

Three questions were raised on this appeal. The first was, Whether the furniture and effects in the copyhold premises were bequeathed with the copyhold premises for the benefit of the parties to whom the copyhold premises were devised? I think not. They are included in the devise to the trustees; but the trusts are declared only of "the hereditaments aforesaid," and of "the rents, issues, and profits thereof;" and the power of sale is given, not to the personal representatives, but to the heirs and assigns of the survivor of the trustees. It is

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probable that the testatrix intended that the furniture and effects should accompany the copyholds; but she has omitted to declare such to be her intention. I am therefore of opinion that they are not included in the gift.

The second question is, Whether the ultimate devise of the premises in *Little Queen Street* be void, either under the Statute of Frauds, or for uncertainty? The earnestness with which the point was pressed at the Bar by very eminent and learned counsel, has induced me to devote more consideration to the subject than I should have thought necessary from any difficulty I have felt upon the point itself. The devise is to trustees to keep in repair the premises, and, subject thereto, to pay the rents to the testatrix's sister, *Mary Innell*, during her life, and after her decease, in trust to dispose of and divide the same unto and amongst her partners who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit and deem advisable.

She gave her stock in trade to her executors to sell, but with liberty for her partners, or the persons who should be entitled to her freehold premises under her will, to purchase the same at a valuation.

She gave the residue of her personal estate amongst certain of her nephews and nieces; but provided that such of her nephews as should be entitled to any beneficial interest in her freehold premises under her will, should have only one half of the shares of the others.

Upon the first head of objection, namely, the Statute of Frauds, it was argued that the will contained no disposition of itself, but that it was a reservation to the testatrix of the power of completing the devise by investing

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vesting the intended devisee with the character described in the will, and that *Habergham* v. *Vincent* (*a*) was in point in support of that proposition. The difference between the two cases is, that the will in *Habergham* v. *Vincent* contained no devise of the remainder; it only declared that the remainder should be for such persons and for such estates as the testator should, by any deed or instrument attested by two witnesses, appoint. This was no disposition of the property; but a reservation by will, inoperative till the testator's death, of a power to dispose, in his lifetime, of freehold property, by an instrument not attested according to the Statute of Frauds.

In the present case, the disposition is complete. The devisee, indeed, is to be ascertained by a description contained in the will; but such is the case with many unquestionable devises. A devise to a second or third son, perhaps unborn at the time — many contingent devises — all shifting clauses — are instances of devises to devisees who are to be ascertained by future events and contingencies; but such persons may be ascertained, not only by future natural events and contingencies, but by acts of third persons. Suppose a father, having two sons, and having a relation who has a power of appointing an estate to some one of them, makes his will, and gives his own estate to such one of his sons as shall not be the appointee of the other estate — or with a shifting clause. Here the act of the donee of the power is to decide who shall take the father's estate; but there is nothing in the Statute of Frauds to prevent this, because the devise by the will is complete, that is, the disposition is complete — the intention is fully declared, though the object to take remains uncertain. If the subsequent act removing that uncertainty, and

(*a*) 2 *Ves.* jun. 204.; and 4 *Bro. C. C.* 353.

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fixing the identity of the devisee, were to be considered as testamentary, in the case above supposed, the donee of the power would be making or completing the will of the father, that is, one man would be making another man's will. The act, therefore, is not testamentary; and, if not, then why should not the act be the act of the testator himself? It is objected to upon the ground of its being testamentary; but if it be not testamentary when done by a stranger, it cannot be so when done by the testator. If it were otherwise, a testator could not devise lands, or give legacies charged upon land, to such person as might be his wife at his death — to such children as he might have — or to such servant as he might have in his service at his death. The cases of charging legacies generally by a will, and naming legatees by an unattested instrument, carry this principle to the greatest length, because the subsequent act ascertaining the party to take is also testamentary; but that rule is recognised by Lord *Rosslyn* in *Habergham* v. *Vincent;* and Sir *W. Grant,* in *Rose* v. *Cunynghame* (*a*), explains it upon the principle I have adverted to. He says the will creates the charge; it is only necessary to shew that there is a legacy; for the moment that character is shewn to belong to the demand, you shew that it is already charged upon the land: and his decision in that case marked the distinction, for the testator did not charge his legacies by his will, and name the legatee by a codicil; but he devised his estate to pay such legacies as he should bequeath to be paid out of his estate; and afterwards, by an unattested codicil, attempted to charge a legacy upon the estate; which Sir *W. Grant* held he could not do, because, not only is the legatee to be found in the codicil, but the will to make the charge — that not being to be found in the will. I think, therefore, the objection upon the ground of the Statute of Frauds cannot be supported.

Then

(*a*) 12 *Ves.* 29. See p. 38.

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Then as to the uncertainty, I think the facts stated in the Master's report, clearly bring the parties within the description in the will. The testatrix, being desirous of herself retiring from business, and having nephews and nieces, some of whom had been her partners, gives up the business to four, some of whom had been her partners, and others whom she then introduced, and gives to the four stock in trade to the amount of 1000*l.*; and, by circulars, introduces to her former connection these four persons, whom she calls her successors. These certainly are persons to whom she had disposed of her business within the meaning of the will.

Another question of some difficulty remains; namely, as to the 2000*l.* This sum was due upon a promissory note of other persons, having two years to run. The testatrix specially endorsed it to *Sarah Sargon*, a married woman, for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present to either branch of the testatrix's family, any portion of the principal or interest thereon, as she might consider most prudent. It was not contended that this constituted a trust which could be executed. It was, therefore, either an absolute gift to Mrs. *Sargon*, or, being for a purpose which fails, it reverts to the original owner, and so constitutes part of her estate. Except for the words "her sole use and benefit," this would have been, no doubt, an assignment for the express purpose of enabling the assignee to bestow the property upon another, and would hardly be contended to be a gift for her own benefit. It is to be observed, that the words are not "for her *own* use and benefit," as in *Wood* v. *Cox* (*a*), which was referred to, but "for her *sole* use and benefit, independent of her husband," apparently meaning not to describe an extent

(*a*) 2 *Mylne & Craig*, 684.

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extent or quality of beneficial interest, but to mark the character in which the donee was to hold the property, namely, as a feme sole, and not as dependent upon her husband. The latter part of this paper strongly confirms the character of trust, which I think belongs to the part I have already considered. It provides that in the event of the death of Mrs. *Sargon*, the author of the gift by that "bequest" empowered her to dispose of the said sum of 2000*l.* and interest, by will or deed, to those of either branch of the family she might consider most deserving. If the gift had been intended for the benefit of Mrs. *Sargon*, with only an intimation of a wish in favour of others, not amounting to a trust, this power to dispose of it by deed or will was wholly useless, being necessarily incident to the gift; but, if Mrs. *Sargon* was to be merely the donee of a discretionary power in favour of others—the mere depositary of a discretion to be personally exercised—then it was natural and proper to specify that such power and discretion might be exercised by deed or will.

I thought that the gift in *Wood* v. *Cox*, was not a gift upon trust, but a gift subject to a charge. This, on the contrary, I think is a gift upon trust; and that—the trust failing,—the property constitutes part of the testatrix's estate.

The revoked codicil of 1829, stated in the report, cannot, I think, be looked at for the purpose of construing this instrument of 1832.

The result is, that I concur, as to all the points objected to, in the judgment of the Master of the Rolls.

The petition of appeal must therefore be dismissed with costs.

1838.

BETWEEN

HENRY DESBOROUGH, - - Plaintiff,

AND

Sir WILLIAM RAWLINS, Knight, JOHN RICHARDS, HENRY PORTER SMITH, ALBERT WILLIAM BEETHAM, and FRANCIS BEETHAM, - - - Defendants.

*Feb.* 8. 10.

A bill filed by the insurers of a life against the insured, to which the solicitor of the insured was a party as a Defendant, stated that, on a particular day, an agent of a company, with whom the insured wished to effect an insurance, came to the office of the insured, and told their agent that the life was bad, handing to such agent at the same time an unfavourable medical report upon the life. The Defendant, the solicitor of the insured, was present at this interview, but in his answer to the bill refused to state what passed, because he was then the solicitor and attorney, and was present as the solicitor and attorney of the insured, and acquired his information, touching the matters which he refused to answer, solely from the fact of his being present at the time, in the capacity of solicitor and attorney, and professional and confidential adviser of the insured:

Held, that this answer was insufficient.

Principles upon which some communications are held to be privileged from disclosure.

THE bill was filed by the Plaintiff, as representing the *Atlas* Insurance Company, against the Defendants Sir *W. Rawlins* and *John Richards*, as two of the directors of the *Eagle* Insurance Company, and against the Defendant *Smith* as the actuary, and the Defendants the *Beethams*, as the solicitors, of that company; and prayed that a policy of insurance, effected by the *Eagle* Company in the names of the Defendants, Sir *W. Rawlins* and *Richards*, with the *Atlas* Company, upon the life of one *John Cochrane*, might be declared fraudulent and void, and be delivered up to be cancelled; and that the *Eagle* Company, and the Defendants *Smith* and the *Beethams*, might be ordered to pay the costs of the suit, and that, in the meantime, proceedings on the policy might be restrained.

The

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The bill stated, amongst other things, that, in the month of *September* 1834, and before the time at which the policy in question was effected, a proposal was made by the Defendant *Smith*, on behalf of the *Eagle* Company, to the *Economic* Insurance Company, for an insurance by them upon *Cochrane*'s life, for the sum of 4000*l*., and that, after some negotiation, Mr. *Travers*, the medical officer of the *Economic* Company, was desired by them to see *Cochrane*; which he accordingly did, on the 20th of *September* 1834; and that he also had an interview with one Mr. *Bennett* respecting *Cochrane*'s health and habits; and that, on the same day (viz. the 20th of *September* 1834) he wrote and sent to Mr. *Knowles*, the managing director of the *Economic* Company, a letter, which was set out in the bill, and which contained a report upon *Cochrane* which was, in some respects, unfavourable.

The bill then alleged that, on *Monday*, the 22d of *September* 1834, Mr. *Downes*, the actuary of the *Economic* Company, called at the office of the *Eagle* Company, taking with him Mr. *Travers*'s letter, and that he then had an interview with the Defendant *Smith*, and told him that the *Economic* Company had had an unfavourable report of *Cochrane*, and would refuse the proposed insurance on his life, and that he (Mr. *Downes*) thought it right to apprize the *Eagle* Company of it immediately, and in candour to shew them Mr. *Travers*'s letter, which was the reason of the refusal; and that Mr. *Downes* then handed Mr. *Travers*'s letter to the Defendant *Smith*, by whom it was perused, and returned to Mr. *Downes*, who thereupon went back to the *Economic* Office, and wrote and sent to the *Eagle* Company a formal letter, rejecting the proposed insurance on *Cochrane*'s life.

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The answer of the Defendants, the *Beethams*, stated that, although when the transactions mentioned in the bill took place, they were the solicitors and attorneys of the *Eagle* Company, yet that they had since ceased to be such solicitors and attorneys, and that they had delivered up to the present solicitors and attorneys of that company all books and papers which they had formerly in their possession, containing entries relating to the matters mentioned in the bill, and had taken a receipt containing a list of the books and papers given up; and it submitted that, even if they could set forth a list of all such books and papers as was required, or could set forth the purport of the entries inquired after, they ought not so to do, inasmuch as the books and papers in question had been in their possession as the solicitors and attorneys of the *Eagle* Company; and it stated that some one or two days before the 24th of *September* 1834, an interview took place between *Downes* and *Smith*, at the office of the *Eagle* Company where *Downes* called: and then it contained the following passage:—"But they, these Defendants, refuse to answer or to discover, and set forth, whether at such time as last mentioned, when the said Mr. *Downes* did call at the office of the said *Eagle* Company, he did, at such time, take with him the aforesaid letter of the said Mr. *Travers*; and whether the said Mr. *Downes* did, at the interview with the said Mr. *Downes* and the said *Henry Porter Smith*, make such statements and give such information to the said *Henry Porter Smith* as thereinbefore in that behalf in the said bill particularly alleged, and did then make any other and what statements relative to the matters in the said bill mentioned, to the like or to any other or what purport or effect; and whether the said Mr. *Downes* did then, after any statement, hand over to the said *Henry Porter Smith* the aforesaid letter of the said Mr. *Travers*; and whether the said *Henry Porter Smith* did take and peruse the aforesaid letter; but this Defendant,

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fendant, *Francis Beetham*, for himself saith, and this other Defendant saith he believes the same to be true, that this Defendant, *Francis Beetham*, was the only person present at the said interview between the said Mr. *Downes* and the said *Henry Porter Smith*. And these Defendants do so refuse to answer and set forth, because they say that, long before and on the said 22d day of *September* 1834, they, these Defendants, were the solicitors and attorneys, and the professional and confidential advisers, of the said *Eagle* Company, and that this Defendant, *Francis Beetham*, was present at the aforesaid interview as the solicitor and attorney and professional adviser of the said *Eagle* Company, and acquired his information touching all and singular the matters and things which these Defendants have as aforesaid refused to answer and discover and set forth, solely and only from the fact of his being present at the time in his capacity of such solicitor and attorney and professional and confidential adviser; and these Defendants humbly submit that they are not bound therefore to answer all or any of such matters and things."

The Plaintiff having excepted to this answer for insufficiency, the Master allowed the exceptions, so far as they related to the parts of the answer above referred to; but, upon exceptions to the Master's report being taken, and argued before the Master of the Rolls, his Lordship allowed them; and thus, in effect, overruled the Plaintiff's exceptions to the answer.

The Plaintiff now appealed from the order of the Master of the Rolls.

Mr. *Wigram* and Mr. *James Russell*, in support of the appeal, cited *Parkhurst* v. *Lowten* (*a*), *Williams* v. *Mundie*,

(*a*) 2 *Swanst.* 194.

*Mundie* (*a*), *Phillipps on Evidence* (*b*), *Greenough* v. *Gaskell* (*c*), *Bramwell* v. *Lucas* (*d*), *Sawyer* v. *Birchmore*. (*e*)

Mr. *Wakefield* and Mr. *W. Hislop Clarke*, *contrà*, cited *Greenough* v. *Gaskell* (*g*), *Purcell* v. *Macnamara* (*h*), *Robson* v. *Blakey* (*i*), *Paxton* v. *Douglas* (*k*), *Thorpe* v. *Macauley* (*l*), *Glynn* v. *Houston* (*m*), *Wheatley* v. *Williams* (*n*), *Turquand* v. *Knight* (*o*), *Rex* v. *Withers* (*p*), *Doe dem. Shellard* v. *Harris*. (*q*)

Mr. *Wigram*, in reply.

The LORD CHANCELLOR.

Since this case was before me the other day, I have looked not only at all the cases which were then cited in the argument, but also at several which were not cited.

I do not think that it is necessary that I should now lay down any rule as to the length to which the privilege should extend. It would not be very easy to do so, consistently with the cases; but I am to consider whether the Defendant clearly brings himself within the privilege; for a Defendant who relies upon the privilege, is undoubtedly bound to bring himself clearly and distinctly within it. Now, the situation of the parties is very material to be considered with reference to the doctrine on this subject, which is laid down in all the cases.

This

(*a*) 1 *Ry. & Mo.* 34.
(*b*) Vol. i. p. 173. *et seq.* 8th edit.
(*c*) 1 *Mylne & Keen*, 98.
(*d*) 2 *Barn. & Cress.* 745.; see p. 748.
(*e*) 3 *Mylne & Keen*, 572.
(*g*) 1 *Mylne & Keen*, 98.
(*h*) *Wigram on Discovery*, 209.
(*i*) 5 *Esp.* 52.
(*k*) 19 *Ves.* 225.
(*l*) 5 *Mad.* 218.
(*m*) 1 *Keen*, 329.
(*n*) 1 *Mees. & W.* 533.
(*o*) 2 *Mees. & W.* 98.
(*p*) 2 *Campb.* 578.
(*q*) 5 *Car. & Payne*, 592.

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This was a transaction between two companies, in which the two companies were so far in opposition to each other, that the *Eagle* Company were desirous of insuring a particular life in the *Economic*, and the *Economic* Company were desirous to obtain information with respect to that life; and the meeting in question was a meeting of an officer of the *Economic*, with an officer of the *Eagle*. The communication was the result of that inquiry. Now, it is very difficult to suppose how that could be the subject of professional communication between the officer of the *Eagle* Company, and the solicitor of the same company. It was a communication from an adverse party. If it had been made directly to the solicitor, for the purpose of being communicated to the company, it would not be very easy to consider it as a privileged communication. That was the exact case in *Spenceley* v. *Schulenburgh* (*a*), where a communication took place undoubtedly (in the terms of this answer) with a solicitor, in the character of solicitor; but it was a communication which, first, the Judge at *Nisi Prius*, and, afterwards, the Court of King's Bench thought that the solicitor was not privileged to withhold. The Court there said, in substance, "This is no privileged communication. The object of the rule as to privileged communications is to secure to parties, who have confidential communications with their professional advisers, the benefit of secrecy as to those communications. This case is not within the mischief which that rule is intended to guard against; and, therefore, not within the rule."

Whether the case of *Bramwell* v. *Lucas* (*b*) was rightly decided or not, is not very material for the present purpose; and the observations made upon it by Lord *Brougham*,

(*a*) 7 *East*, 357. (*b*) 2 *Barn. & Cress.* 745.

rougham, in *Greenough* v. *Gaskell* (*a*), are not made th reference to the principle of the case, but with refer- ce to the question, whether the principle was properly plicable to the facts. Undoubtedly, looking at the :ts of that case (I mean of *Bramwell* v. *Lucas*), it is not ry easy to come to the conclusion to which the Court :re came in point of fact. The question was, whether : client had committed an act of bankruptcy on a rticular day. On that day, the client inquired of his icitor, whether he could safely attend a particular eting of his creditors, without being arrested for debt. ie solicitor advised him to stay in his office; and he cordingly did stay there for upwards of two hours, to oid being arrested. The question was whether what ssed between the solicitor and his client was receivable evidence. That looks undoubtedly very like a profes- nal communication for the purpose of obtaining ad- :e; and the Court said, if it was a professional com- nication, it was privileged. If, therefore, the client ked the solicitor his advice in point of law, whether could with safety attend the meeting of his creditors, e communication would be privileged, but the Court id that, in its nature, it could not be privileged, but that was merely an inquiry of fact, whether the client's editors, because they had clearly all their legal rights, ould arrest him; and that the only question was, whe- er they had agreed not to do so: and the Court held at the question was one of fact, and not of law. There as no question, therefore, as to the principle upon hich the Court intended to act: the only question as whether the facts justified the application of the rinciple. But both *Bramwell* v. *Lucas* and *Greenough* v. *Gaskell* shew that the privilege only applies to cases in hich the client makes a communication to his solicitor with

(*a*) 1 *Mylne & Keen*, 98.

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with a view to obtaining his legal advice. That is undoubtedly the same ground upon which I held, in *Sawyer* v. *Birchmore* (*a*), that a solicitor, when examined as a witness, was bound to produce letters communicated to him from collateral quarters, and to answer questions seeking information as to matters of fact, as distinguished from confidential communications: and I so decided, not on the authority of *Bramwell* v. *Lucas* only, but I distinctly referred to *Spenceley* v. *Schulenburgh*. In *Sawyer* v. *Birchmore* the question arose as to a solicitor being bound to disclose the circumstances of certain transactions in which he had been concerned as solicitor. I was of opinion that the facts were not sufficiently brought before me to shew that they were privileged; and finding it laid down by the Court of King's Bench, that communications are not privileged, if coming from any other quarter, but that they would be, if they came from the client, I found that a case might exist in which many papers in a solicitor's hands would not be privileged. It was precisely the same in *Spenceley* v. *Schulenburgh*; I thought, therefore, that the facts did not bring the case within the privilege applicable to confidential communications.

There is nothing in the doctrine laid down by Lord *Brougham* in *Greenough* v. *Gaskell* inconsistent with this; and the only observation is, not that the doctrine laid down was wrong, but that there might be a question how far the facts were sufficient to entitle the Court to apply the doctrine to the facts. There, *Gaskell* was employed as solicitor by a person named *Darwell*. He had advanced money for his principal upon the security of a promissory note given on behalf of his principal by the Plaintiffs; and the question was, whether *Gaskell* had

(*a*) 5 *Mylne & Keen*, 572.

had not induced the makers of the note to give it, and whether he had not fraudulently concealed from them the fact that his principal was insolvent. He put in an answer, in which he denied that the note had been given by the Plaintiffs at his instance; but he admitted that he had been aware of his client's circumstances at the time in question, and he also admitted the possession of books, papers, and letters relating to the matters mentioned in the bill: and he set forth a list of them in a schedule; stating, however, that the entries in the books were made, and the papers and letters written and received by him in his capacity of confidential solicitor for his client. Lord *Brougham* refused to order the books, papers, and letters to be produced.

As to many of those papers, undoubtedly the privilege would apply. It did not appear to me at the time (*a*), nor does it now appear to me, that there might not be papers to which that privilege would not apply. The Defendant, the solicitor, stating what he did, I should doubt whether the Court would not call on him to set out the papers in particular, and to give them in more detail. It is, however, not at all essential to go further into the examination of the particular circumstances of that case, for it is quite clear that Lord *Brougham* intended to lay down the rule as he found it laid down in all the cases; and his only observations upon *Bramwell* v. *Lucas* had reference to the facts of that case.

Such being the rule, the only question is, whether the Defendant in the present case has used such words in his answer as clearly and distinctly to bring himself within it.

Now

(*a*) The Lord Chancellor was counsel in the case.

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Now the very first question is one which I should think it very difficult for him to protect himself from answering, for he says *Downes* came to the office, but he objects to state whether he came with a particular letter in his hand; and then, upon reading the terms in which the Defendant has put his refusal to answer, the first observation which suggests itself is, that if the reasons which he gives for that refusal be good, it is quite clear that the decision in *Spenceley* v. *Schulenburgh* (*a*) was wrong; for the party for whom the witness in that case was solicitor, and the party with whom he was dealing, were opposed to each other. On one side a person comes on the part of the Plaintiff, and brings to the Defendant's solicitor a certain paper, the contents of which the Defendant's solicitor is called upon to prove; and the Court of King's Bench said that the privilege was restricted to communications, whether oral or written, from the client to his attorney, and could not extend to adverse proceedings communicated to him, as attorney in the cause, from the opposite party, in the disclosure of which there could be no breach of confidence.

Suppose that it had been to or from *Beetham* personally that the letter had been communicated, the case would be exactly within *Spenceley* v. *Schulenburgh*; and the question would be, whether the solicitor, to whom, as solicitor, the communication was made, would be entitled to withhold it. The Court of King's Bench said he would not, because it was not confidential between himself and the party for whom he was solicitor.

As to all the rest, I dare say this gentleman intended it to be supposed that the words were used in their ordinary

(*a*) 7 *East*, 357.

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ordinary sense. He has not pledged his oath to the circumstances under which he obtained the information, in such a manner as to shew that it is to be considered privileged.

It may be that the Defendant (*Francis Beetham*) was present accidentally, and so heard what passed; but at all events those who claim the privilege are bound to bring their case within it. I cannot say, till I have learned how the Defendant came to be present, who sent for him, and so forth, whether the communication was privileged.

I say nothing as to what the result will be when the circumstances shall be more distinctly stated. The question I have to decide is, whether the Defendants have on their answer protected themselves from the discovery: and I think that they have not.

As to whether they were properly made Defendants, I cannot enter into that question, because I find them Defendants; and the only question before me is, whether being Defendants, they have put in a sufficient answer: but I trust that nothing I say in this or in any other case will tend to promote the practice of making witnesses Defendants to a suit.

Exceptions to the Master's report over-ruled.

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*June* 15.

## ADAMS *v.* FISHER.

A Plaintiff, as personal representative of a deceased testator, stated, by his bill, that *F.*, a Defendant, had acted as his solicitor, and had, in that character, received various sums on account of the testator's estate, for which he had not accounted to him; and alleged that he had lately discovered, as the fact was, that the Defendant *F.* had some time since prevailed upon him (the Plaintiff) to execute a power of attorney to *P.*, authorising him (*P.*) to get in the testator's estate, and to employ another attorney under him; and the Plaintiff charged, that this power of attorney was a contrivance between *F.* and *P.*, to enable *F.* to receive the assets without being liable to account to the Plaintiff; and that fraudulent misrepresentations, on *F.*'s part, accompanied the execution of the power of attorney; and that the Defendants had in their possession books and papers relating to the matters mentioned in the bill, and by which the truth of such matters would appear.

THE amended bill, which was filed by *John Adams* as administrator (with the will annexed) of *John Collingridge*, against *William Fisher* and *John Thomas Pinckard* (in the bill called *Thomas Pinckard*), as personal representative of *John Pinckard*, stated *Collingridge*'s will, under which the Plaintiff was one of the four persons to whom the residue of the money to arise from the sale and conversion of his real and personal estate was given; and stated that the Defendant *Fisher* had, in the course of his employment by the Plaintiff as his attorney and solicitor, received various sums of money on account of *Collingridge*'s estate, for which he had never accounted: that the Plaintiff had lately discovered, as the fact was, that *Fisher*, several years ago, prevailed upon the Plaintiff, and the several persons entitled under *Collingridge*'s will, to execute some power of attorney to a person of the name of *John Pinckard*, authorising him to get in *Collingridge*'s outstanding personal

The Defendant *F.*, by his answer, set out a power of attorney from the Plaintiff to *P.*, authorising him (*P.*) to get in the testator's estate, and to employ an attorney under him; and stated that he (*F.*) had never been employed by the Plaintiff, but had been employed, as an attorney and solicitor, solely by *P.*, acting under the power of attorney; and had, in the course of such employment, received various sums on account of the testator's estate, for which he had duly accounted to *P.* He denied the charges of contrivance and misrepresentation. He admitted the possession of certain documents relating to the testator's estate and affairs; but submitted that he was not bound to produce them, and that he was not accountable to the Plaintiff.

Held, that *F.* could not be compelled to produce the documents admitted to be in his possession.

personal estate, and to employ another attorney under him, and to stand possessed of the money to be received upon trust for the Plaintiff and the several persons executing the power of attorney: and that *Fisher* paid some part of the moneys received by him to *John Pinckard:* and that *John Pinckard* was now dead, and that the Defendant *Thomas Pinckard* had become his personal representative:

That the Defendants had received, or got into their possession, divers title-deeds, and muniments of title belonging to the unsold parts of the estates of the testator, and which, by his will, were directed to be sold; and also divers securities for money due to the estate of the testator, and divers other papers relating to his affairs; and also the power of attorney to *John Pinckard:*

That the Defendants refused to comply with the Plaintiff's applications for an account and payment, and delivery of the deeds and papers; sometimes pretending and alleging that *Fisher* was employed by *John Pinckard* merely, as his solicitor, under the power of attorney, and that he (*Fisher*) has duly accounted to him for the trust-moneys, as his employer; whereas the Plaintiff charged that *John Pinckard* was a friend and client of *Fisher*, and that the obtaining of the power of attorney to him was a mere contrivance on the part of *Fisher* to get possession of the trust-moneys in such a manner that he might not be liable to account to the Plaintiff or any other person interested therein; and in which contrivance *John Pinckard* concurred and consented, as the same would appear, if the Defendants would produce and set forth the accounts and documents thereinafter required to be produced and set forth: and as further evidence thereof the Plaintiff charged that the Defendant

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*Fisher* had applied or retained the greater part of the moneys so received by him in payment of his bills of costs incurred in obtaining the same, and without such bills ever having been taxed; and the Plaintiff charged that the same ought to have been and ought still to be taxed, and that it was a breach of trust in *John Pinckard* to permit *Fisher* to retain or pay himself the whole amount of his bills of costs without taxing the same, and without once ever having requested that the same should be taxed: that *Pinckard* was, as such trustee, under the power of attorney to him, and that his estate was still, liable to account to the Plaintiff for all the moneys so received by *Fisher*; and that *Fisher* was, under the circumstances therein-before stated, also liable to account for the same: and as further evidence of the matters aforesaid, the Plaintiff charged that the power of attorney, so executed by him and the other persons, was, at the time of the execution thereof, represented to the Plaintiff and the other persons executing the same as being an authority to *Fisher* himself: and the Plaintiff charged that the power of attorney was falsely read over to him and to the other parties executing the same, for that the same was read over as a power of attorney to *Fisher*, whose name frequently occurred in such reading, and not as a power of attorney to *John Pinckard*, who was then only partially known to the Plaintiff and the other persons executing the power of attorney.

The bill alleged a pretence that the testator's estate was indebted to the Defendants, or to *John Pinckard*, to a greater amount than the sums so received on account thereof; and charged the contrary, and that the testator's estate was never indebted to the Defendants, or to *John Pinckard*,—except only for such costs as had been fairly incurred by *Fisher*, as attorney and solicitor, in and about the testator's estate, and the amount of which had been long

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long since received by *Fisher*, over and above the particular sums specified in the bill as having been received by him; though his bills of costs had never been taxed, as the Plaintiff charged they ought to be, if *Fisher* should allege that anything was due to him in respect thereof: and that the truth of the several matters last aforesaid would appear, if the Defendants would set forth, as the Plaintiff charged they ought to do, an account of all sums received by them, or either of them, or by *John Pinckard*, in respect of the real and personal estate of the testator, and of the application thereof.

The bill finally charged, that the Defendants had frequently stated and admitted, both by writing and verbally, in the presence of divers persons, that the several sums of money so received by them, as in the bill mentioned, were received and held by them upon trust for the Plaintiff, as personal representative, and for the benefit of the persons entitled thereto under *Collingridge*'s will; and that the Defendants, or one of them, had then, or had lately, in their or his custody, possession, or power, divers books, accounts, letters, and writings, in which such statements and admissions, or some other statements or admissions to the like purport or effect, were contained, and would appear if produced; and that the same would also plainly so appear by the account which the Plaintiff had before charged that the Defendant ought to set forth, touching his transactions with the testator's estate; and that, besides the several deeds, documents, papers, and writings, thereinbefore particularly mentioned or referred to, the Defendants had in their custody divers deeds, books, &c., relating to or containing some entries of or references to the several matters and things before stated and charged; and whereby, if produced, the truth thereof would appear: and that they had formerly, in their

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custody, divers other documents of a like nature to those last inquired after, or otherwise relating to the matters before-mentioned, which they had destroyed or made away with, or parted with the possession of; and that they ought to set forth a schedule of all the documents before-mentioned.

The prayer of the amended bill was, that an account might be taken of all sums of money received by the Defendants or *John Pinckard*, deceased, from or on account of the produce of the real and personal estate of the testator, and of what was due and owing from the Defendants, or either of them, in respect thereof; and that, in taking the accounts, the Defendants might be charged with interest and annual rests; and that they might be ordered to pay to the Plaintiff what should be found due to him as such administrator as before-mentioned: and that, if the Defendant, *John Thomas Pinckard* (in the bill called *Thomas Pinckard*), did not admit assets of *John Pinckard*, then that the usual accounts of *John Pinckard*'s estate might be taken; and that the Defendants might be decreed to deliver up to the Plaintiff all books, accounts, deeds, and writings, belonging to or concerning the produce of the real and personal estate of the testator *Collingridge*, or otherwise relating to his affairs.

Before the amended bill was filed, *Fisher*, who was the only Defendant named in the original bill, had, on the 25th of *September* 1835, put in his answer, and had thereby denied that he was employed by the Plaintiff as his attorney or solicitor on the occasion mentioned in the bill, or on any occasion, or generally in the management of the testator's affairs; but stated that, in the month of *July* 1821 the Plaintiff, being in needy circumstances, and unable to bring to a close certain proceedings instituted

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instituted by the Crown, in the Court of Exchequer, against his testator's estate, and mentioned in the bill, applied to *John Pinckard*, Esq., who had then lately become the purchaser of a debt of 500*l.* and upwards, owing by *Collingridge*'s estate, to undertake the winding up of the affairs of that estate; and that *John Pinckard* agreed so to do; and that, for the purpose of giving him the necessary authority, a power of attorney, bearing date in the month of *July* 1821, was duly made and executed under the hands and seals of the Plaintiff, and *Ann Adams*, *Jane Adams*, and *William Adams*, being the other persons entitled to *Collingridge*'s residuary real and personal estate; by which, after reciting that a considerable part of his personal estate yet remained outstanding, and that they were desirous of appointing *John Pinckard* their attorney, and of giving him sufficient powers and authorities to do all things necessary for enabling the Plaintiff to make a speedy provision for the adjustment of the affairs and payment of the debts of *Collingridge*, in order that his residuary estate might be ascertained and divided between the Plaintiff and *Ann Adams*, *Jane Adams*, and *William Adams*: it was witnessed, that the Plaintiff and *Ann Adams*, *Jane Adams*, and *William Adams*, appointed *John Pinckard* their attorney, for them, and in their names, but to and for their use and benefit, to enter into and upon, and to take possession of, all and singular the unsold real estate and chattels of *John Collingridge*, and to continue in the possession thereof, and to receive all rents in respect of the same, and to recover all debts, chattels, and effects whatsoever, which at the time of *Collingridge*'s decease were due and owing and belonging to him, and which then, or at any time thereafter, should be due, owing, or payable to the Plaintiff, and *Ann Adams*, *Jane Adams*, and *William Adams*, or any of them, or which were part of *Collingridge*'s estate; and

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and also to adjust, settle, and compromise, all accounts, debts, demands, controversies, differences, and disputes, in which *Collingridge* was, at his decease, or the Plaintiff, and *Ann Adams*, *Jane Adams*, and *William Adams*, or any of them, then were or was, or at any time should or might be at any time interested or concerned by virtue of *Collingridge*'s will; and for those purposes to appear for and represent the Plaintiff, and *Ann Adams*, *Jane Adams*, and *William Adams*, in all courts of law and equity, and to make attorneys or substitutes under him;—with various other powers (stated in the answer) for effectuating the before-mentioned purposes:

That in pursuance of the authority vested in *John Pinckard* by the power of attorney, he, in or about the month of *July* 1821, appointed the Defendant (*Fisher*) and his then partner, *Richard Hodges Munday*, as his attorneys and solicitors in reference to the affairs of *John Collingridge*; and afterwards, on the dissolution of that partnership in the year 1823, appointed the Defendant (*Fisher*) alone as his attorney and solicitor; and that first he and his partner, and afterwards he alone, as such attorneys and solicitors and attorney and solicitor, carried on various law matters for *John Pinckard*, in respect of the matters mentioned in the power of attorney, and particularly the proceedings in the Exchequer, and other proceedings, all of which were mentioned in the bill: and, that in the course of conducting such litigation, very large costs were incurred, in respect of which the Defendant (*Fisher*) and his partner, and afterwards the Defendant alone, made out and delivered to *John Pinckard* seven several bills of costs, amounting together to 562*l.* 8*s.* 6*d.*: and that, in the course of such proceedings, the Defendant and his partner, and afterwards the Defendant alone, received various sums of money, amounting together to 672*l.* 7*s.* 4*d.*, exceeding

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ıe amount of the seven bills of costs by the sum of 09*l.* 18*s.* 10*d*: and that, after the Defendant (*Fisher*) ıd delivered in all the said bills of costs to *John inckard*, he (*Fisher*) rendered to him a cash account, hereby the balance of 109*l.* 18*s.* 10*d.* was made to ›pear owing, as was the fact, by the Defendant: that *ohn Pinckard* examined the bill of costs, and found ıe same to be correct, and that the Defendant (*Fisher*) ıid the balance of 109*l.* 18*s.* 10*d.* to *John Pinckard*, ho gave to the Defendant a stamped receipt, in the ords following, viz. "*Rex* v. *Collingridge.* Received Mr. *William Fisher* the sum of 109*l.* 18*s.* 10*d.*, being ıe balance due from him after payment of the bill of sts of himself and Messrs. *Fisher* and *Munday*;" as y the said receipt, now in the Defendant's possession, ıd ready to be produced, would appear; and save as efore-mentioned, and as could be collected by the ›wer of attorney, the Defendant denied that the sums ı received by him, or by him and his partner, or any such sums or any sum of money, were or was re-ıived by him in trust for the Plaintiff as personal presentative of the testator, or for the benefit of the ersons entitled thereto under the trusts of the testator's ill, or for any other purpose, other than in trust to count for the same to *John Pinckard*, by whom alone ıe Defendant was employed, and to whom, accordingly, ıe Defendant duly accounted for the same.

The Defendant (*Fisher*) denied that he had since he as employed by *John Pinckard*, as before-mentioned, ı the testator's affairs, or ever, or in the course of such nployment, or in his transactions with the testator's roperty and affairs, received any other sum of money, art of the personal estate or of the produce of the free-old and copyhold estates of the testator, save as re-arded the said several sums amounting to 672*l.* 7*s.* 4*d.*

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so received and accounted for as before-mentioned: he insisted that he was never employed by or accountable to the Plaintiff; and submitted, that even if he were accountable to the Plaintiff (which he denied), more than six years had elapsed since the last of the transactions before-mentioned took place; and he claimed the same benefit of the lapse of time as if he had pleaded it in bar.

The Defendant (*Fisher*) denied that he had got into or now had in his possession, custody, or power, divers or any title-deeds or muniments of title belonging to the unsold or any part of the estates of the testator, which by his will were directed to be sold, or otherwise; or also divers or any securities or security for money due and owing to the estate of the testator: however, he admitted that he had in his possession divers documents and papers relating to the testator's estate and affairs; a full, true, and correct list or schedule whereof he had set forth in the schedule to that his answer annexed, and which he prayed might be taken as part of that his answer, and to which he craved leave to refer: but he submitted that the Plaintiff had no right or title to call for the production of the same, or any of them.

The Defendant (*Fisher*) denied that he pretended that the Plaintiff, or the testator, or the testator's estate, was indebted to him in a greater amount than he had received, or was alleged to have received; and admitted that neither the Plaintiff nor the testator's estate was ever indebted to him, save so far as, under the circumstances before-mentioned, the testator's estate might be considered to have been indebted in the amount of the said several bills of costs, all of which were properly incurred and paid as before-mentioned: he denied that the whole

or

or any part of the costs mentioned in the bill, or any costs, had been received by him from the testator's estate, over and above the several sums in the bill mentioned in that behalf, and alleged to have been received by him (*Fisher*); or in any way, or out of any funds, save as before mentioned: and stated that all his said several bills of costs were duly signed and delivered to *John Pinckard*, his sole employer, and were paid by *John Pinckard* upwards of seven years ago; and that *John Pinckard*, being satisfied therewith, did not think it necessary to tax the same, which were accordingly never taxed; and he (*Fisher*) did not pretend that any thing was due thereupon; and submitted that the same could not now be taxed, the more especially as he submitted that the Plaintiff had never any right to tax the same.

The Defendant then went on to state, that, save as before mentioned, and as regarded the several documents and papers mentioned in the schedule to the answer, he denied that he had then, or lately, or at any time, in his custody, any deeds, accounts, books, &c., relating to or containing any entry of, or reference to the several matters and things in the bill mentioned, stated and charged, or any of them, or otherwise to the affairs of the testator: and he denied, according to the best of his knowledge, remembrance, information, and belief, that by any of the several documents and papers mentioned in the schedule, or by any other means, if produced, the truth of any of the matters mentioned in the bill would appear, save so far as the truth of any of such matters was therein (*i. e.* in the answer) made to appear; and the Defendant, submitting that the Plaintiff had no right or title to call for a production of the documents mentioned in the schedule, admitted he refused, and submitted he was not bound, to produce the same, or any of them: he denied that he had at

any

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any time also in his custody any other documents of a like nature to those inquired after by the bill, or otherwise relating to the matters therein mentioned, which he had destroyed, or in any manner made away with or parted with the possession of, or that he refused to state what had become thereof, none such having existed: he denied that he had frequently, or ever, stated or admitted, in writing or verbally, that the sums alleged to have been received by him were received or held by him upon trust for the Plaintiff as representative, or for the benefit of the persons entitled under the will of *Collingridge*, save that the cash account, delivered to *John Pinckard*, was headed, "*John Pinckard*, Esq., on behalf of himself, and other creditors, and the representative and legatees of Mr. *John Collingridge*, deceased, in account with Messrs. *Fisher* and *Munday*, and Mr. *Fisher*." He added, that save as before mentioned, and as therein (*i. e.* in the answer) appeared, he denied, according to the best of his knowledge, remembrance, information and belief, that he had then, or lately, in his custody any accounts, letters, papers and writings in which such alleged statements and admissions, or any other statements and admissions to the like purport or effect were contained, or would appear if produced; or that, save as before mentioned, the same would also plainly appear by the account which the Plaintiff had by the bill charged that he (the Defendant) ought to set forth touching his transactions with the testator's estate: and the Defendant submitted that he was not liable to account with the Plaintiff in respect of the matters mentioned in the bill or of any other matters, and that the Plaintiff was not entitled to any relief against the Defendant: and the Defendant claimed the same benefit of his objections to the bill and to the Plaintiff's claim as if he had pleaded to the bill.

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The schedule annexed to this answer enumerated a copy of *Collingridge's* will, and the draft of the power of attorney; papers in certain proceedings taken to recover parts of the testator's estate; an account current between the Defendant and *John Pinckard*; the receipt before mentioned; and certain letters and day-books, and letter-books and other papers; but did not enumerate any bills of costs.

The Defendant *Fisher*, by his answer to the amended bill, put in on the 5th *December* 1836, although he admitted that the Plaintiff's name had been used in certain proceedings which had been taken by him for the purpose of recovering part of the testator's estate, yet repeated the statement which he had made in his answer to the original bill, that he never was employed by, or acted as the solicitor and attorney of the Plaintiff, or any of the legatees under *Collingridge's* will, but was employed solely and exclusively by *John Pinckard*, under the circumstances and by the authority of the power of attorney mentioned in the original bill: he denied that the Plaintiff had recently discovered, or that it was the fact that he (*Fisher*) prevailed upon the Plaintiff, or any of the persons entitled under the testator's will, to execute any power of attorney to *John Pinckard;* and stated that the Plaintiff and the other parties entitled under the testator's will were poor and indigent persons, and not in a situation to prosecute their claim, and that *John Pinckard* undertook to prosecute such claim on their behalf, and employed him (*Fisher*) as his attorney and solicitor therein; and that to enable *John Pinckard* so to prosecute the said claim, a power of attorney, to the purport and effect mentioned in the Defendant's answer to the original bill, was prepared by the Defendant (*Fisher*) as the solicitor of and under the direction, and at the request of *John Pinckard*, and

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and with the privity and approbation of the Plaintiff and the other parties entitled as before mentioned; and that such power of attorney, when prepared, was sent by the Defendant (*Fisher*) to *John Pinckard*, that he might get it executed by the Plaintiff and the other parties; and which was accordingly done, without any personal interference of the Defendant. He admitted that he had the draft of the power of attorney in his possession: he repeated his denial of possession of title-deeds, muniments, or securities relating to the testator's estate, or, save as therein and in the answer to the original bill appeared, any other papers relating to the testator's estate and affairs: he denied that *John Pinckard* was a friend of his; but admitted that he had been a client of his, and denied that the intervention of *John Pinckard* was a mere contrivance on his (*Fisher's*) part to get possession of the trust-moneys in such a way that he might not be liable to account with the Plaintiff, or any other person interested therein, or that *John Pinckard* concurred in or consented to such alleged contrivance, or that the same would appear if the Defendant and *John Thomas Pinckard* (in the amended bill called *Thomas Pinckard*) would set forth the accounts and documents in the bill required to be produced and set forth: he submitted, that the said several bills of costs having been paid to him more than six years ago, under the circumstances in the answer to the original bill set forth, ought not to be taxed: he denied the charges in the amended bill as to the false representations with respect to the power of attorney, and the false reading of it; and stated his belief that the power of attorney was executed to *John Pinckard* in consequence of his being a person of property and respectability, who had become the purchaser of a considerable claim on the testator's estate, and was, on that account, likely to attend to the winding up of the affairs thereof, which

were

were greatly entangled; and that he (*Fisher*) had been informed and believed that *John Pinckard* was, at the time of the execution of the power of attorney, and had long before been, known, not partially, but very well, to the Plaintiff and the other parties who executed the same. He denied that he had ever stated or admitted, that the sums of money alleged to have been received by him, were received or held by him upon trust for the Plaintiff, as representative, or for the benefit of the persons entitled thereto under the will, or on any other account, save for *John Pinckard*, who alone employed him: he denied, according to the best of his knowledge, remembrance, information, and belief, that save as therein, and in his answer to the original bill appeared, he had then, or lately, or ever, in his custody any books, &c. in which such statements or admissions as in the bill mentioned would appear, or that the same would also plainly appear by the account which the Plaintiff had charged that the Defendant ought to set forth touching his transactions with the testator's estate, or that, besides the several deeds, documents, papers, and writings in the bill particularly mentioned or referred to, and except as appeared in the present answer and the answer to the original bill, that he had now, or lately, or ever, in his possession, any deeds, books, &c. relating to, or containing any entry or reference to all or any of the several matters and things in the amended bill stated and charged, or whereby, if produced, the truth of all or any of such matters and things would appear; or that he had formerly in his custody any documents of a like nature to those inquired after in the amended bill, or otherwise relating to all or any of the matters and things mentioned in the bill, which he had destroyed or made away with, or parted with the possession of: he denied that he had refused to

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state what had become thereof, or to set forth a list of them, he having, in the present answer, and in his former answer, set forth a full, true, and correct list or schedule thereof. The Defendant (*Fisher*) finally submitted, that the Plaintiff had made no case for relief whatever against him by the amended bill; and that, under the circumstances in the present answer and in the answer to the original bill mentioned, he (*Fisher*) ought not to be called upon by any person whatever for any account in relation to the testator's estate; and he claimed the same benefit of lapse of time, and of the before mentioned receipt, as a bar to any such claim, as if he had availed himself thereof by way of plea.

There was no schedule to the answer to the amended bill.

The Defendant, *John Thomas Pinckard*, put in his answer on the 28th of *November* 1836.

On the 5th of *February* 1838, the Plaintiff gave a notice of motion, that the Defendants might produce and leave with their Clerks-in-Court "a certain receipt for the sum of 109*l.* 18*s.* 10*d.* from *John Pinckard* to Mr. *W. Fisher*, and the several bills of costs, documents, books, bills, accounts, books of account, letters, papers, memorandums and writings, relating to the estate and affairs of the testator in the pleadings of this cause mentioned, and in the answer of the Defendants respectively and the schedules thereto respectively mentioned, described, and referred to, and admitted to be in their possession," and that the said documents, books, &c., might be produced at the examination of witnesses, if necessary, and upon the hearing of the cause, upon notice thereof being given to the Defendants for producing of the same, and

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nd that the Plaintiff, his Clerk-in-Court, solicitors, and gents, might be at liberty to peruse and take copies.

This motion having been made before the Master of he Rolls, and having, on the 12th of *March* 1838, been efused by him, as regarded *Fisher*, with costs, a motion as now made before the Lord Chancellor, that the rder of the Master of the Rolls might, as to so much hereof as related to *Fisher*, be discharged or varied, and hat an order might be made in the terms of the notice f motion of the 5th of *February* 1838, so far as such iotice applied to the Defendant *Fisher*.

Mr. *O. Anderdon*, in support of the motion.

If a solicitor has in his hands documents essential to he Plaintiff's case, the Plaintiff may make him a party to the record, and call upon him to produce the documents; *Fenwick* v. *Reed* (*a*). The Defendant has ncorporated the schedule in his answer. The objection nade before the Master of the Rolls was, that there was no sufficient privity between the Plaintiff and *Fisher*; but the simple question upon matters of this kind is, do he documents of which the possession is admitted relate o the matters in question in the cause; and, if there is an admission that they do so relate, it will be sufficient.

*The* LORD CHANCELLOR.

You must shew such a connexion between the Plaintiff and Defendant as entitles the Plaintiff to see the documents: you cannot file a bill against a mere stranger for the production of documents.

Mr.

(*a*) 1 *Mer.* 114.; see pp. 122, 123.

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Mr. *O. Anderdon.*

Here, however, the parties stand in a fiduciary relation. A bill is the proper mode to adopt for the purpose of having the solicitor's bills of costs taxed, in a case of this kind, where the solicitor chose to look to Mr. *Pinckard,* though he dealt with the Plaintiff's name. The Defendant might be compelled to set out the documents at full length in the answer, and the production of the documents is part of the discovery which the Defendant by answering submits to make; the Plaintiff is not bound to wait till he shall have established his title to an account from the Defendant at the hearing of the cause; *Unsworth* v. *Woodcock.* (*a*)

*The* LORD CHANCELLOR.

If that were to be carried to the length to which you seem to carry it, it would make every application for the production of documents a matter of course.

Mr. *O. Anderdon.*

Yes, unless the Defendant has brought himself within some one of the grounds of protection, such as that the documents are of a privileged character.

*The* LORD CHANCELLOR.

What the bill requires is not the contents of the documents, but a list of the documents; and you cannot except to the answer, because the contents are not set out.

Mr. *O. Anderdon.*

The Defendant might be compelled to set them out.

*The*

(*a*) 3 *Mad.* 432.

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*The* LORD CHANCELLOR.

You may ask him to do that, and then he may make his defence.

Mr. *O. Anderdon.*

In *Hardman* v. *Ellames* (*a*), which has carried the doctrine on this subject to its true length, the Court held that a party merely referring to a document, which was part of his own defence, entitled the Plaintiff to call for its production. The right way of raising the defence which the Defendant has set up, viz., a denial of the Plaintiff's right to the account, would have been a plea. The Defendant might have been required to set out his bills of costs at length. The Defendant does not allege that the documents are privileged, or that he has a duty to perform to some one else with respect to them.

In *Evans* v. *Richard* (*b*), the application for the production of documents was resisted on the ground that the bill disclosed an illegal contract which could not be enforced; but the Lord Chancellor there says, "the event of the motion must depend on the fact, whether the answer contained an admission that the documents in question are in the custody of the Defendant. When the Court orders letters and papers to be produced, it proceeds on the principle that those documents are by reference incorporated in the answer, and become a part of it; being in the office, the effect is the same as if they were stated in *hæc verba* in the answer;" not putting it at all upon the point that if you make on the face of the bill a requisition that the documents shall be set out in *hæc verba*, that would expose the Plaintiff to the peril of costs. If a bill be filed, in which a liability to account is

(*a*) 2 *Mylne & Keen*, 732. (*b*) 1 *Swanst.* 7.

is asserted, there is reason to suppose that there may be a decree for an account; and if the Defendant does not demur or plead, the Plaintiff has a right to go on to a hearing; and, for the purpose of assisting him to prove his case at the hearing, he has a right to see the documents in the Defendant's hands, which relate to the matters mentioned in the bill. In this case the amended bill charges collusion between *Fisher* and *Pinckard*, and charges that *Fisher*'s bills ought to be taxed, and prays an account generally. *Fenwick* *Reed* (*a*) shews that you may bring a solicitor before the Court merely to ask costs against him. It is unnecessary, however, to enter into the question of the propriety of making *Fisher* a party in this case; for the rule is, that if a Defendant does not think fit to demur or plead, and consequently answers, he cannot retire from any particular part of his answer which he thinks fit. Your Lordship is not bound now to determine, whether, on a record framed as this is, the Plaintiff is entitled to the relief he asks.

*The* LORD CHANCELLOR.

Suppose a bill is filed by a person claiming to be a creditor or legatee, or in any other assumed character and the Defendant denies that the Plaintiff is what he alleged to be, but states, on the contrary, that he is a perfect stranger, and denies, in short, everything which the Plaintiff proceeds, but, not having protected himself by plea, he is obliged to answer; is the Plaintiff as a matter of course, to ask for all the documents in possession of the Defendant which relate to any of matters introduced in the bill? I only want to know how far you carry the principle; whether, as a m

(*a*) 1 *Mer.* 114.

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matter of course, documents, which, if the Defendant's allegation is true, have nothing to do with proving the case made by the bill, are to be produced for the Plaintiff's inspection? If a bill is filed by a person as a creditor, and he asks for all the title deeds of the real estate, is the Plaintiff entitled to see the title deeds of a person's estate, because he calls himself a creditor, which the Defendant denies that he is?

Mr. *O. Anderdon.*

In the case last put by your Lordship, the deeds would not relate to the mode in which the Plaintiff is to make out that he is a creditor. But, if a bill is filed by a person as a creditor, the Defendant must set out an account of the estate, though he denies the debt. So in the case of a bill for tithes, the Defendant cannot refuse to set out an account, though he denies the liability to pay tithes to the Plaintiff. In the case of title deeds put by your Lordship, the inspection of the deeds before the hearing could do the Plaintiff no service at the hearing of the cause: but if the Plaintiff in this cause cannot have now the documents which he asks for, he cannot have them at the hearing. If a creditor's bill be filed, the mere traversing the Plaintiff's title does not induce the Court, upon an interlocutory application, to refuse production of the documents in the Defendant's possession. The fact of the bill having been filed shews, for the purposes of the suit, that the Plaintiff is a creditor. The production of the deeds of the real estate would only go to shew what the estate was, which was to be administered. But suppose the bill charged a pretence, that the deeds were not the deeds of the testator, but of another person, the Plaintiff would probably be held entitled to see them. The authorities lay it down that the Plaintiff is entitled to have the production of everything he could carry into the Master's

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office, and certainly everything he might take into court at the hearing. The purposes of justice require such a production.

*The* LORD CHANCELLOR.

As I understand the facts of the case, *Fisher* the solicitor was employed by *Pinckard*, he knowing, as he must have known, that in the transaction which was the subject of the suit, *Pinckard* was acting under a power of attorney from *Adams*: but still the retainer was entirely between *Pinckard* and *Fisher*. *Pinckard* settles the account with him. Then *Adams* says, I certainly have a right to an account against my trustee, and if he has improperly paid sums on account of the costs, they must, as a matter of course, be disallowed. The bill is then filed, and a claim made against the trustee, alleging that he has retained, on account of costs, more than he ought. Mr. *Fisher*, by his answer, denying all connection with the Plaintiff, and all privity between them, the question is, whether, in such a state of the pleadings, *Adams* is entitled to enforce the production of the documents mentioned in *Fisher*'s answer.

Now I took leave to ask Mr. *Anderdon* how far he carried the principle; and he very properly limits it within its due bounds; that is, he admits, as to every document not necessary to make out the Plaintiff's equity, that the Plaintiff is not entitled to see it. Whatever may make out the Plaintiff's title he may have a right to see. The documents in question, however, are not to make out *Adams*'s title to have the bills taxed, and the production of them could not possibly aid the assertion of the equity which *Adams* has asserted by his bill.

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Then as to the cases referred to. In *Unsworth* v. *Woodcock* (*a*), the facts of the case, unfortunately, are not stated, but it is quite obvious that the pleadings did shew a title in the Plaintiff to the production of the documents. The Vice-Chancellor assumes, as the whole ground of his judgment, that the case was one in which the Plaintiff ought to see the documents; that is, that he had such an interest in them as entitled him to see them. What the facts were does not appear; but the Court assumes that the Plaintiff might have compelled the Defendant to set out the contents of the documents in his answer.

*Evans* v. *Richard* (*b*) was a case in which the sole question was the illegality of the contract. There was no question about the title: the two parties to the cause were partners in the adventure, and, of course, therefore, the Plaintiff had as much interest in the documents as the Defendant. There was no question as to the interest which the Plaintiff had in the documents to be produced. The only doubt was, whether the question about the illegality of the adventure was to deprive the Plaintiff of the right which, as to the interest, was not disputed.

Then it was said that, in the present case, the Plaintiff had a right to make *Fisher* a party to the suit; and in support of that proposition the case of *Fenwick* v. *Reed* (*c*) was cited. The marginal note (which appears to be correct) of that case is as follows; — "Attorney *submitting* to produce title deeds of his client in his possession, as the Court shall direct, may be called upon to produce them, if the principal could himself have been called upon to do so. Generally it

(*a*) 3 *Mad.* 432. (*b*) 1 *Swanst.* 7. (*c*) 1 *Mer.* 114.

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it is not necessary to make an attorney a party because he has title deeds in his possession, although it may become so under particular circumstances." No question was made, therefore, as to the attorney's willingness to produce the documents; but Lord *Eldon's* observations as to the propriety of making a solicitor a party, are guarded, as may naturally be supposed, from the habits of that learned Judge. He says (*a*), "Generally speaking, and *primâ facie*, it is certainly not necessary to make an attorney a party to a bill seeking a discovery and production of title deeds, merely because he has them in his custody, because the possession of the attorney is the possession of the client; but cases may arise to render such a proceeding advisable, as if he withholds the deeds in his possession, and will not deliver them to his client on his applying for them." That is, if *Fisher* had refused to produce the documents to Mr. *Pinckard*, then, Lord *Eldon* says, there is reason for another person's applying. In *Fenwick* v. *Reed*, the solicitor did not object to being made a party, and did not dispute the Plaintiff's interest in the documents. All that Lord *Eldon* says amounts only to this:—"I look to see whether the co-defendant is liable to produce the documents; and I must consider them, when in the possession of the attorney, as being in the possession of the party employing the attorney, inasmuch as the attorney does not set up the want of privity between him and the Plaintiff as a defence."

As to *Hardman* v. *Ellames*, it is not very pertinent to the present case. It was certainly no new decision, and I was very much surprised to hear any one treat it as such; and when I came to look into the doctrines laid down in the books, I felt no doubt upon the subject. Where

(*a*) See p. 123.

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Where a party has thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, he cannot be permitted to make any representation of it, however unfounded, which he pleases; but the Plaintiff is entitled to see whether the Defendant has rightly stated it. It is because the Defendant chooses to make it part of his answer that the Plaintiff is entitled to see it; not because the Plaintiff has an interest in it. The principle is, that a Defendant shall not avail himself of that mode of concealing his defence. But, whether that decision be right or wrong, it is quite distinct from the present case. I apprehend it is a mistake to say that the documents scheduled are part of the answer: the schedule itself is part of the answer. All that the Plaintiff asks is, that the Defendant may set forth a schedule of the documents. Can you except, because he has set out the documents in the schedule instead of in the bill? You did not ask that they should be set out in the bill. If that had been asked, the Defendant must have defended himself in the regular way, and shewn that he was not obliged to comply with your demand. But if the Defendant sets them out in the schedule to his answer, the question is, upon the whole record, whether the Plaintiff has such an interest in them as entitles him to call for their production? Here the Defendant has denied the Plaintiff's interest; he has, on the record, stated that which, as it stands, in my opinion excludes the Plaintiff from instituting this suit against him. As long as that stands, I think the Plaintiff is not entitled to see the documents.

Sir *W. Horne* and Mr. *Bagshawe* appeared for the Defendant *Fisher*, but were not called upon.

1837.
*Dec. 5.*
1838.
*Nov. 24.*

## WALFORD *v.* MARCHANT.

A freehold estate worth 100*l.* a year was devised in trust for the testator's daughter, a married woman, for her separate use, for life; with remainder in trust for all her children by her then present or any future husband, as tenants in common in fee; subject to a proviso that, if the daughter should die without leaving issue of her body, the estate should be in trust for her surviving brothers and sisters. In 1822, the daughter and three of her six children joined in granting an annuity of 48*l.*, charged on the devised estate: Held, that this annuity was within the exception of the 53 *G.* 3. *c.* 141., and therefore did not require enrolment.

THE bill was filed by *John Walford* and *Mary* his wife. It prayed that the Plaintiff, *Mary Walford*, might be declared entitled to an annuity of 48*l.*, and all arrears thereof, and to have the benefit of the powers and authorities given and granted by an indenture of the 4th of *April* 1822, for securing and enforcing payment of the same. The decree directed that the Master should inquire and state whether the annuity in question was valid or not.

The Master, by his report, found that *John Cullum*, deceased, by his will gave and devised unto and to the use of his wife *Elizabeth* (since deceased), his sons, the Defendants, *Stephen Cullum* and *Samuel Henry Cullum* and *George Cullum* (since deceased), and his son-in-law, the Defendant, *Henry Marchant*, the elder, and the survivors and survivor of them, their and his heirs and assigns, certain freehold messuages and premises in the county of *Middlesex*, and therein described, upon trust, after the decease of his (the testator's) wife, to pay the rents and profits thereof unto his daughter, the Defendant *Rose Hood Marchant* (lately deceased), wife of *Henry Marchant* the elder, or to such person as she should, notwithstanding her coverture, appoint, for her sole and separate use, during her life; with remainder in trust for all and every the child and children of *Rose Hood Marchant*, by her then present or any future husband, as tenants in common, their

heir heirs and assigns for ever. The will then contained his proviso: — "I do hereby further declare my will to be that, if either of my said sons or daughters shall depart this life without leaving issue of his or her body lawfully begotten, then that the trustees for the time being of this my will shall stand seised and possessed of the hereditaments and premises hereby given and devised in trust for him or her so dying without issue, and the rents, issues, and annual proceeds thereof, upon trust for his or her surviving brothers and sisters, in equal shares and proportions."

The report further found that the testator died in the month of *September* 1818; that his wife *Elizabeth* and his son *George* died shortly afterwards; that by an indenture of grant dated the 4th of *April* 1822, made between *Henry Marchant*, the elder, and *Rose Hood Marchant*, his wife, and the Defendants, *Henry Marchant*, the younger, *John Marchant* and *Stephen Marchant*, of the one part, and the Plaintiff *Mary Walford* of the other part, — after reciting the will of *John Cullum* and his death, and the deaths of *Elizabeth Cullum* and *George Cullum*, respectively, and further reciting, as the fact was, that *Rose Hood Marchant* had six children then living, namely, *Henry Marchant*, the younger, *John Marchant*, and *Stephen Marchant*, parties hereto, who had all attained the age of twenty-one years, and three others, — it was witnessed that in consideration of 600*l.* to *Henry Marchant* the elder, and *Rose Hood* his wife and her said three sons, paid and advanced in bank notes by the agent of *Mary Walford*, at or before the execution thereof, *Rose Hood Marchant*, in pursuance and by virtue of the power reserved to her by the said will, granted, bargained, sold, and appointed, and her said three sons, according to their respective sixth parts in reversion, granted, bargained, sold, and confirmed, unto *Mary Walford*, her executors,

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executors, administrators, and assigns, for the term of fifty years, commencing from the date of the indenture, provided she (*Mary Walford*), *John Marchant*, and *Robert William Nott* (since deceased) or any or either of them should so long live, a clear annuity of 48*l.* sterling, to be issuing out of, and charged upon, the aforesaid devised messuages and premises, and payable quarterly. The indenture secured to the grantee powers of distress and entry in case the annuity should fall into arrear; and it also contained a covenant by which the grantors severally became bound for the due payment of the annuity, and a proviso reserving to them, or any of them, a right to redeem the annuity upon the terms therein mentioned.

The report further found that the premises on which the annuity was charged were of freehold tenure, and, at the time of the grant of the annuity and now, were of the annual value of 100*l.* and upwards; that, in *Michaelmas* term 1827, in consequence of the annuity being then in arrear, the Plaintiffs, *John Walford* and *Mary* his wife, in right of *Mary Walford*, brought an action of debt in the Court of King's Bench against the Defendant *John Marchant*, one of the grantors of the annuity, for the recovery of the arrears, in which action they obtained a verdict for 120*l.*, and costs, subject to the opinion of the Court upon a case reserved: that the case was afterwards argued and disposed of, and the verdict confirmed, whereby the validity of the annuity was established at law; but that owing to the poverty of *John Marchant*, the Plaintiffs had not been able to obtain payment of the said sum, or of the costs.

The Master further reported that, on the part of the Defendants, it had been contended before him that the consideration stated in the memorial of the indenture to have been paid for the annuity, was therein stated

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to have consisted of 600*l.* in Bank of *England* notes; whereas, in fact, the sum of 40*l.* only was so paid, the sum of 50*l.* having been retained for the purposes therein mentioned; and the residue having been paid to the Defendants by cheques upon Messrs. *Ladbrokes* and Co., which were not cashed until the day after that on which they were given; and the Defendants had therefore submitted to him that, under the circumstances aforesaid, the annuity was invalid, inasmuch as no proper memorial of the grant was enrolled in manner required by law.

The Master then reported that he had considered the matters aforesaid, and was of opinion that the annuity was a valid annuity.

To this report an exception was taken, insisting that the Master ought to have certified that the annuity was invalid, inasmuch as no proper memorial of the grant of the annuity had been enrolled in such manner as was required by law.

*The Solicitor-General* and Mr. *Hayter*, for the Exceptants.

The exception raises two questions; first, whether this annuity is one which required enrolment according to the provisions of the 53 *G.* 3. *c.* 141., the statute then in force with respect to annuities; and, if so, secondly, whether a memorial of the grant has been duly enrolled. The present is not a case falling within exceptions specified in the tenth section of the statute. That section among other things declares, that the act shall not extend "to any annuity or rent-charge secured upon freehold or copyhold or customary lands in *Great Britain* or *Ireland*, or in any of his Majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity

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and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant." The grantors of this annuity were a mother, having an equitable life interest in the entirety of the property to be charged, and three out of six children who were then entitled to reversionary interests in that entirety as tenants in common in fee. They did not come within the description of persons seised of the fee simple or fee tail in possession, or persons enabled to charge the fee simple in possession at the time of the grant, as required by the words of the exception. Besides, the mother might have had other children born subsequently, and then the extent of the reversionary interests belonging to the three children joining in the grant, which was equal to a moiety of the annual value, or 50*l.* a year, would have fallen below what the section requires, for it would have been of smaller annual value than the annuity. Again, the mother might have survived all her children; and in that event the estates limited to the three who were parties to the grant would have been wholly defeated, and the property would have gone over to the brothers and sisters of Mrs. *Marchant*, under the proviso in her father's will. The legislature never could have meant to exempt from the operation of the statute annuities charged upon uncertain and defeasible interests of that kind. The Master's report is erroneous in representing the judgment of the Court of King's Bench upon the case reserved (*a*) as having concluded this question, which, in fact, was never raised at all. The point there argued and determined was of an entirely different nature, viz. as to the effect of a prior annuity, granted by the same parties and secured by a judgment,

(*a*) *Walford* v. *Marchant*, 2 *B. & Adol.* 315.

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judgment, in reducing the annual value of the lands charged, below the amount of a subsequent annuity, so as to deprive the latter of the benefit of the exception; and Lord *Tenterden* held clearly that it did not. If the annuity be one that requires enrolment, the cases establish conclusively upon the facts appearing in the Master's report that no proper memorial of it has been enrolled; *Drake* v. *Rogers* (*a*), *Ex parte Lewis.* (*b*)

Sir *W. Horne* and Mr. *Jemmett*, for the Plaintiffs.

The alleged invalidity of the memorial is immaterial, because no enrolment was necessary, the case being one which is specially exempted by the tenth section of the act. Mrs. *Marchant* and her three sons, at the time of the grant, had, among them, what amounted to an equitable estate in fee simple in possession in a moiety of the property; and the report finds that the annual value of the entirety was worth more than double the annuity. *Shrapnel* v. *Vernon* (*c*) has decided, and it is now perfectly settled, that equitable as well as legal estates are within the exception of the Annuity Act: and where the parties joining in the grant of an annuity possess among them (as they did here), the whole dominion over the estate, one of them being tenant for life in possession, and the others having the immediate remainder in fee, such annuity has been also held to fall within the exception, although, literally, none of the grantors are seised in fee simple or fee tail in possession; *Halsey* v. *Hales* (*d*). The three sons who were parties to the grant had a vested interest, immediately expectant on their mother's death; and although their estate

(*a*) 2 *Brod. & Bing.* 19.

(*b*) 2 *Ad. & Ell.* 135.; and see Sir *Edward Sugden's* observations, *Law of Vendors and Purchasers*, vol. ii. App. xiii. p. 326. 9th ed.

(*c*) 2 *Bro. C. C.* 268.

(*d*) 7 *T. R.* 194.

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estate might have been partially defeated by the birth of other children, it extended, at the time of the grant, which is all that the act requires, to three undivided sixths, or in other words, to a moiety of the property intended to be charged. Mrs. *Marchant* has since died without having had any other children, and the circumstance of her death before her children would be an answer to any objection grounded upon the supposed effect of the proviso in her father's will. Such an objection, however, does not really arise; for, upon the true construction of the proviso, the limitation to the children took effect and became absolute on their birth, and the limitation over was only to operate in case Mrs. *Marchant* should not have children. The case in the Court of King's Bench in effect decided the point, for the sole matter there in contest was the validity of this identical annuity.

*The Solicitor General*, in reply.

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*The* LORD CHANCELLOR, after shortly stating the circumstances of the case, as they appeared upon the report, and observing that the facts were not in dispute, the exception applying only to the conclusion which the Master had drawn from those facts, gave judgment as follows: —

The first question is, whether any memorial was necessary under the statute 53 *G.* 3. *c.* 141. The tenth section of that statute provides that the act shall no extend to any security upon freehold lands of equal c greater value than the annuity, over and above ar other annuity, or the interest of any mortgage of whi the grantee had notice at the time, whereof the gran

was seised in fee simple or fee tail in possession, or the fee whereof in possession the grantor was enabled to charge at the time of the grant.

I cannot concur in the Master's opinion, that the result of the action (reported in *2 B. & Adol.* 315.), establishes the validity of the annuity; for the question there raised and decided, was merely whether a judgment was to be considered as a charge upon the estate, within the meaning of the act, so as to reduce the income of the land below the amount of the annuity, and consequently to render a memorial necessary. But it certainly proves that the point now insisted upon against the annuity was not then thought to be available.

From the statement in the Master's report, which is not in question, the income of the estate, available for the payment of the annuity, exceeds the amount of the annuity; that is, the mother, who was entitled to the whole income for her life, and her three sons, entitled to three sixths, after her death, possess together half the property found to be worth 100*l.* a year and upwards, the annuity charged upon the half being 48*l.*

It was contended, however, that these parties had not together such an estate as the act requires, for that they were not seised in fee simple or fee tail, and were not entitled to charge the fee in possession at the time of the grant. The devise was in trust for the mother for life, and after her decease for all and every her children as tenants in common in fee; but it was said that there is a proviso that, if any of the testator's sons or daughters should die without leaving issue, the trustees should hold the premises devised in trust for him, or her, so dying without issue, in trust for his or her surviving brothers

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and sisters, as tenants in common; and thence it was argued, that the estate charged might fail by the death of all the six children before the mother. In order to support this objection, it must be held that the event contemplated in the proviso is a dying without children living at the death of the parent; but that would be contrary to the established construction of the words used. I am therefore of opinion that the grant is within the exception of the statute, and did not require any memorial.

Had it been necessary to decide upon the legal validity of the memorial, there must have been a reference back to the Master, because the report does not state any of the circumstances relied upon as objections to the memorial as facts, but only as the grounds on which it had been contended before him, that the memorial was invalid.

The result is, that the Master, in my opinion, came to the right conclusion, and that the exception must be over-ruled.

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BETWEEN

JACOB BERNAL and ESTHER, his Wife, and Others - - Plaintiffs;

AND

JOSEPH BERNAL, JOSEPH DE CASTRO, LEAH BERNAL, and Others Defendants.

*Feb.* 21. 28.

AND BETWEEN

The said JOSEPH BERNAL and Others, Plaintiffs;

AND

The said JACOB BERNAL and Others, Defendants (*a*).

The petition of *Jacob Bernal* and *Abraham Bernal*, "male descendants of *Benjamin Bernal*, the favoured nephew of the testator *Joseph Bernal*," stated,

"Male children," in a *Dutch* will, held to mean "male descendants;" and "male descendants" held to mean, according to the *English* law, [and *semble* according to the *Dutch* law also,] descendants claiming through males only.

THAT *Joseph Bernal*, otherwise *Gaspar Francis Bernal*, the testator in the cause, made his will at *Amsterdam*, dated, at the commencement, the 4th of *October* 1693,

(*a*) The reporters are indebted to the kindness of Mr. *Sidebottom* for the following note of the general proceedings in these causes: —

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"The circumstances of this case are exceedingly singular. In the year 1729 an order was made as to the application of the fund, and which was acted upon down to the period when the petitioner [*Jacob Bernal*] made his first application, in 1834; and a vast number of orders were made, from time to time, admitting objects of the charity, upon the footing of the original order. In the year 1834, however, it was found that the descendants of the testator's nephew, *Benjamin Bernal*, were

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1693, and at the end the 2d of *December* 1695, and that in such will were contained the following clauses, viz., "I order that the effects which I have in the *India* and *African Company* of *London* and their profits shall be applied

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were so numerous, that it would be necessary that some new rule of distribution should be resorted to, in order to limit the number of objects. The petitioner, who was one of the parties in the receipt of the income of the fund, as one of the objects of the charity, presented a petition to the Master of the Rolls, for directions as to the administration of the charity; and upon that petition coming on to be heard, the other parties, the then partakers of the charity, for the reason before mentioned (viz. the necessity of limiting the number of participants), and not with any idea that any attempt would be made to alter the course of administration of the charity, except in order to limit its objects, consented to a reference to the Master to approve of a new scheme. When the parties got into the Master's office, the petitioner brought in a state of facts, in which he insisted that the *male* descendants of the testator's nephew were alone entitled to share, on account of the Jewish law (as it was alleged) excluding females from inheriting. The Master, upon this claim being submitted, made a report, submitting the question to the Court; and the petitioner having presented a petition upon the report to Sir *J. Leach*, then Master of the Rolls, he referred it back to the Master to proceed to approve of a scheme *having regard to the course that had been continually pursued*. From this order the petitioner appealed to the Chancellor, and the matter came on to be heard before Lord *Lyndhurst*, in the year 1835, when, although no judgment was then given, his Lordship expressed an opinion that the question was not to be decided according to the Jewish law, but that the Court had never definitively determined the question as to who were the proper objects; and it occurring to his Lordship to put a question as to the domicil of the testator, the matter stood over for the purpose of making an inquiry relative thereto.

"The matter was afterwards brought before Lord *Cottenham*, when Lord Commissioner, who concurred in opinion with Lord *Lyndhurst*, that, notwithstanding the practice of considerably more than a century, there was no binding decision of the Court; and he therefore referred it to the Master to inquire what was the proper domicil of the testator; and, upon the suggestion by the Appellant's counsel that the

applied to the performance of this my will; and what shall remain, be it little or much, it shall be put into stock into the chamber of *Zealand*, whose dividends and those of *London*, with the interest of 1200*l.* in that of the

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the testator was domiciled in *Holland*, and that it might probably be the case that the peculiar laws of the Jews were recognised in that country, and *by consent* of the Respondents, it was further referred to the Master, in case he should find that the testator was domiciled in *Holland*, to inquire what was the law of that country, having regard to the circumstance of the testator being a Jew. On the matter being discussed before the Master, he (the Master) required to see the probate of the will. It then appeared that the will had been proved in *Holland*, and that probate was granted in this country upon a translated copy only. Upon inspection of that copy, it appeared to differ considerably from the statement of the will, as set out in all the previous proceedings. And, in particular, in the first clause, in which provision was made for the descendants of the testator's nephews and nieces, the descendants of the nephews were mentioned by the name of "*male children*." The Master being of opinion, upon the production of the probate (and with no further evidence), that the testator's domicil was in *Holland*, the opinion of a *Dutch* counsel was taken upon the construction of the will, who, upon the ground of the term "male children" being used in the above clause, although not elsewhere repeated, was of opinion that the other passages of the will, bearing upon the subject, must be controlled in their construction by the expression in question; and, therefore, although male and female descendants of the testator's *nieces* might be allowed to take benefits as objects of the charity, yet that the *male* descendants only of the *nephews* were entitled. This opinion he founded merely upon general reasoning, and not upon the ground of any particular law bearing upon the subject. But the advocate stated that there was no difference in the law of *Holland* between Jews and others. Upon this the Master made his report in favour of the *Dutch* domicil, and stated the law of *Holland* to be as the advocate had stated it.

"On the matter coming on again before the Court for further directions, Lord *Cottenham*, then Chancellor, was of opinion that the Master should have received further evidence; and it was referred to the Master to review his report for that purpose. Accordingly, further evi-

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the *African* at *London* shall be applied to keep the capital entire; except that it should happen to appear to my executors that any of the relations hereinafter named should be reduced to want; in which case all the dividends or interest shall be applied to those in necessity, which

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dence was produced before the Master, the effect of which was to shew from the books of the Jewish congregations in *London* and *Amsterdam*, that the testator had become a member of the Jewish synagogue at *Amsterdam*, and had greatly diminished his contributions to the synagogue in *London*; and upon these and other grounds, the Master again made his report in favour of the *Dutch* domicil.

"During these proceedings, an apparently very ancient copy of the will, in the original *Spanish*, with a translation annexed, differing from the translation in the probate, was produced, having been always in the custody of the solicitors whose house had had the management of the cause for at least half a century. By this translation the word translated "male children" in the copy admitted to probate, was translated "children;" and the original in the *Spanish* copy was the word "*hijos*," a word meaning children in general, and so translated in other parts of the probate copy. Inquiry also was made as to the original will, which, according to the custom of *Amsterdam*, had been left in the possession of the notary concerned in its proof; but it was found, that a very few years ago the house containing all the original notarial acts of that notary, and including, therefore, the original will, had been burnt.

"Under these circumstances, it was contended, on the part of the Appellant, by Mr. *Wakefield* and Mr. *Cooper*, 1st, that the copy in the possession of the solicitors could not be received in evidence, and that the Court was bound to consider the copy admitted to probate as the only authentic copy; 2dly, that the testator was domiciled in *Holland*, because it appeared from the will that the testator carried on business in *Holland*, and that his trustees and executors were residents in that country; and that the legacies were given in *Dutch* coin; and also that the testator died in *Holland*, and his will was proved in that country, and that it was clear, from the circumstances of the testator becoming a member of the *Dutch* synagogue, and diminishing his payments to the *London* synagogue, that he had become domiciled in *Holland*; and, thirdly, that such being the case, the opinion of the *Dutch* advocate was conclusive.

"On

which are *Jacob Levi Ganez*, *Abraham* and *Jacob de Isaac Bernal*, *Isaac de Jacob Bernal*, *Benjamin Bernal*, and also *Rachel Louzado*, *Leah de Castro*, and *Esther Franco*, if they or their children shall come to want, and in like manner *the male children of the above named men*, also included in this clause; *Leah*, *Rachel*, and *Esther* of *Jacob Bernal* my brother, and their children, whom God prosper, they may not come to want this. And it is also my will that when it shall happen that any female orphan of my generation be Jews, are to be married, there shall be given to them 1000 guilders dowry out of the

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"On the other hand, it was contended by Sir *W. Horne* and Mr. *Sidebottom*, on the part of the Respondents, first, that, under the circumstances, the *Spanish* and *English* copies in the possession of the solicitors ought to be considered as evidence of the contents of the will; secondly, that the testator was domiciled in *England*, because it clearly appeared from his will that he resided and carried on business in *London*, and had a house there, and that he resided in *London* with his wife and mother, both of whom were buried in *London*; that his will spoke of his furniture, plate, and papers in his house in *London*, and that the will had been made at different times, and that the last date of it was in the year of his death: so that, to that very year, it appeared that he had maintained his *English* domicil and establishment; and that, as it was quite clear upon the face of the will that he had acquired an *English* domicil, and as it could not be proved that he had altered that domicil, and taken another, he must be considered as domiciled in *England* at the time of his death; *Somerville* v. *Somerville*, 5 *Ves.* 750.; and, thirdly, that the *Dutch* opinion was only matter of general reasoning, and could not be looked upon as a statement of *Dutch* law on the subject.

"*The* LORD CHANCELLOR, however, was of opinion that the probate copy must be conclusively considered as the document upon which the Court was to act, and that the opinion of the *Dutch* counsel was to be considered as conclusive evidence of the law; but took time to consider the question of domicil; and afterwards, during the Vacation, stated his opinion to coincide with that of the Master on the subject of domicil."

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the said interest by the votes of the executors of my will, and the grandsons and the great grandsons of the race of my father who is in glory, that shall be found living in Judaism; which my executors shall perform, and when any die shall name others in their place. Item, I name for my executors of my testament and this my will, *Jacob Levi Ganez* and *Abraham Bernal*, my nephews; with power at the end of their days to name others in their place, to execute and administer of what shall be left of my estate and effects, in the manner that shall appear to them to be most for the security and benefit: for that my meaning is, that as much stock as may be shall be preserved, that their produce may answer and be applied to the necessities of those of the race of my father (whom God hath), at the discretion of my executors, and those they shall name in their places; and I charge the one and the other to choose out of our heirs and near kindred persons capable; to the end that in this manner the money hereof may be preserved for the comfort and succour of our family, and that they may be provided for; and I hope other relations will augment this stock, to the end that they may have greater assistance in the adversity that may fall them (from which God deliver us), the descendants or near kindred, who for sins may suffer these or the like misfortunes (from which God deliver them), that they may succour the others. I say my will is, that *Isaac de Jacob Bernal*, and *Benjamin Bernal*, my nephews, be also my executors, that they may receive of my goods and effects be it only by *Jacob Levi Ganez*, or who else shall have a power from him and the rest, for that they may help him in fulfilling my will, and have voices in the things and succours that are to be given more than what is herein expressed in this my last will; and likewise my will is, that in those causes *Leah de Castro* and *Esther Franco*, my nieces, shall meet and have votes, by reason they have more knowledge

ledge of our relations in *Spain*, and of my inclinations and obligations. And I charge every body that they give to the children of *Benjamin Bernal*, and prefer them to others if they should want, or be to be married:"

That the testator died at *Amsterdam* in the year 1696, and that his will was shortly afterwards duly proved there by his executors:

That on or about the 29th of *January* 1722 (all the testator's executors being then deceased), the Defendant *Joseph Bernal*, the eldest son of the before-mentioned *Benjamin Bernal*, procured letters of administration, with a translation of the will annexed, to be granted to him by the Prerogative Court of *Canterbury*:

That by the decree made in these causes on the 9th of *December* 1728, it was referred to the Master to take an account of the testator's personal estate, and the produce thereof, from the several persons who had received the same; and that it was ordered that the parties should lay a scheme before the Master for the distribution of the interest and income of the stock and funds therein mentioned:

That the Master made his report, dated the 26th of *January* 1729, in pursuance of the decree, and certified that, at that time, fourteen persons therein named, and no more, were in want, and proper objects of the charity, and that he had approved of the scheme that had been laid before him, as a good rule for distributing and disposing of the dividends of the stock:

That as the persons mentioned in the report died, others were, from time to time, admitted partakers of the dividends and interest of the fund in Court, by divers orders of the Court; and that, by an order dated the

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the 10th of *February* 1768, it was ordered that the interest and dividends of the fund in Court, should be paid to the several persons therein named, in manner therein mentioned; and that, by an order made on the 22d of *June* 1768, it was ordered that the dividends arising from the old *South Sea* annuities, then in Court, should be divided amongst the several persons therein named:

That many persons continued, from time to time, to be admitted partakers thereof, by various orders, and, that by an order dated the 22d of *January* 1806, it was ordered (amongst other things) that the interest thereafter to accrue due on the 8162*l.* 0*s.* 6*d.*, old *South Sea* annuities, then in Court, until further order, should be divided into thirty-two equal shares amongst the several persons therein named:

That, by an order of the 25th of *March* 1833, it was ordered that the interest and dividends of the 8162*l.* 0*s.* 6*d.*, *South Sea* annuities, being the then fund in Court, should be divided and paid to and amongst the nineteen persons therein named, that is to say, the petitioners, *Jacob Bernal* and *Abraham Bernal*, and also *Deborah Sanguinette*, *Hannah Sanguinette*, *John Sanguinette*, *Elias Sanguinette* the younger, *Joseph Sanguinette*, *Isaac Rodrigues*, *Sarah*, the wife of *John Tullock*, *Esther*, the wife of *Joseph Banks*, *Marian*, the wife, and afterwards the widow of *Charles Upton*, *Deborah Rodrigues*, *Esther Genese*, *Isaac Genese*, *Sarah Genese*, *Abraham Genese*, *Sampson Genese*, *Hannah Genese*, and *Samuel Genese*, by half yearly payments, until the further order of the Court:

That the several nineteen persons, named in the last mentioned order, continued to receive the dividends of the

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ıe said annuities, under such order, until the year 834, when the payment thereof ceased or was sus-ended, by reason or in consequence of the proceedings fter mentioned:

That on or about the 18th of *June* 1834, the peti-oner, *Jacob Bernal*, preferred his petition in these auses to the Master of the Rolls, praying such declar-tion as to the proper persons entitled to or to parti-ipate in the dividends of the funds in Court, as should ppear to be just, and to give such directions, for the uidance of the Master or otherwise, as should appear xpedient, or to make and give such other declarations, rder, and directions, touching the matters aforesaid, s the case might require, and to his Honor might seem neet:

That, by an order of the Master of the Rolls, made n the hearing of the petition, bearing date the 25th of *June* 1834, it was, amongst other things, ordered that he Master should proceed in the reference directed by former order of the 20th of *January* 1834; and, in o doing, he was to have regard to the course which had een thitherto adopted as to the construction of the vill: And that it was ordered, that so much of the said 3162*l.* 0*s.* 6*d.*, old *South Sea* annuities, standing in the ame of the Accountant-general, in trust in these causes, s would be sufficient to raise the amount of certain osts in the petition mentioned, should be sold; and hat, out of the money to arise by the sale, the costs hould be paid:

. That the petitioner, *Jacob Bernal*, on the 31st of *October* 1834, preferred his petition of appeal to the hen Lord Chancellor, stating the several matters afore-aid, and otherwise as therein mentioned, and appealing against

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against so much of the order of the Master of the Rolls of the 25th of *June* 1834, as directed him to proceed in the reference directed by the order of 20th of *January* 1834, and, in so doing, to have regard to the course which had been thitherto adopted as to the construction of the will; and that the petitioner submitted the several matters in his petition mentioned to the consideration and judgment of the Court, and prayed a reversal of so much of that order as was complained of, and such declaration and order as prayed by the petition, touching the matters therein mentioned:

That the last mentioned petition came on to be heard before Lord *Lyndhurst*, then Lord Chancellor, who directed it to stand over for his judgment; and that his Lordship afterwards directed the petition to stand in his paper for judgment, when his Lordship raised the question of the testator's domicile, and directed a further argument of that question:

That before any further argument of that question took place, Lord *Lyndhurst* ceased to be Lord Chancellor, and that the petition afterwards came on to be heard before the Lords Commissioners, who made an order thereon, bearing date the 31st of *July* 1835, whereby it was referred to the Master to enquire and state what was the domicile of the testator at the respective times of making his will, and of his death; and in case the Master should find that the testator was domiciled in *Holland*, then it was ordered that the Master should inquire and state what was the true construction of the testator's will, in regard to the property the subject of this suit, according to the law of *Holland*, at the respective times of the dates of the said testator's will and of his death, as regarding the wills or testaments of persons professing Judaism domiciled in *Holland*,

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*land;* and if there were any difference in respect of such law at the respective dates of such will, and of the death of the testator; with liberty to state special circumstances; and that further directions and costs were reserved:

That the Master, by his report, dated the 18th of *June* 1836, found that the domicile of the testator was at *Amsterdam*, and certified, that being of that opinion, he caused a copy of the will, annexed to the letters of administration, to be translated into *Dutch;* and that he also caused a case to be prepared for the opinion of *G. Delprat*, an advocate practising at the *Hague*, the said *G. Delprat* having been approved of by the solicitors for all parties interested, as a proper person before whom the said case should be laid; and that the case having been also approved of by the solicitors, and having been also translated into *Dutch*, the same was, with the copy of the will, laid before Mr. *Delprat* for his opinion: And that the Master stated the case, which, amongst other things, stated that the property, the subject of the suit, was derived under and had immediate reference to the two clauses or items in the will, which were marked in the margin of the copy of the will sent therewith, and an opinion was requested on the following question: "What was the true construction of the will of the testator, in regard to the property, the subject of the marked clauses, according to the law of *Holland* at the respective times of the dates of the testator's will and of his death, as regarding the wills or testaments of persons professing Judaism domiciled in *Holland;* and was there any difference in respect of such law at the respective dates of the will and of the death of the testator?" And that the Master found that Mr. *Delprat*'s opinion, as translated, was as follows,

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"The conclusion of the case in the cause of the Master in the Court of Chancery, *Bernal* v. *Bernal*, is as follows: 'What was the true construction of the will of the said testator in regard to the property, the subject of the said marked clauses, according to the law of *Holland* at the respective times of the dates of the said testator's will and of his death, as regarding the wills or testaments of persons professing Judaism in *Holland*; and was there any difference in respect of such law at the respective dates of the said will and of the death of the said testator?' Upon this query, I am of opinion the following ought to be the answer. According to the will of *Joseph Bernal*, alias *Gaspar Francisco Bernal*, alias *Don Luis de Andrade*, alias *Juan Bueno de Paz*, he has not expressly disposed of the property of the funds, out of which revenues the distressed relatives ought to be assisted. Often, in a will, the property of a capital, which is separated from a fixed intention or an institution, is not disposed of. Such intention may lapse in the course of time, and become infeasible; and then the question arises, to whom must the property belong or go to? According to the law in force in the years 1693 and 1695, the will was then so interpreted that the property belonged to the heirs instituted by the will; and should no universal heirs or legatees have been appointed, to the heirs *ab intestato*. That law existed *ex analogiâ* of the law with respect to legacies. See *Hugo Grotius, Introduction to the Dutch Jurisprudence*, 11 book, 24 vol. ss. 37 and 38. Also, of such legacies, the property is considered to belong to the instituted heirs or to the heirs *ab intestato*, just so as meant by the *Casus Positivi*: See *Van Leeuwen Censur Forensis*, Lib. 3., c. 4., s. 42. *Voet, ad Pand. Tit. De his quæ ut indignis auferuntur*, Lib. 34. Tit. 9. s. 5. and particularly *Bynkershoek, Quæstiones Jurisp.* Lib. 3. c. 9. on the

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the question "*quibus cedant quæ non capientibus relinquntur.*" Therefore in respect to this question such right existed as emanated from the jurisprudence in *Holland.* At the time of making the will, the 4th *October* 1693, and 2d *December* 1695, and at the time of the death of the testator, according to the statement of the case, about *August* 1696, the same was in force with regard to capitals of which the property had not been disposed, and the property belonged to the appointed heirs; and, by default of them, to the heirs *ab intestato.* Now, in regard to persons professing Judaism in *Holland*, the law was the same between Christians and Jews: there existed in that respect no difference. According to the resolution of the States of *Holland* of the 30th of *September* 1656, the Jews were obliged to conform themselves according to the political decrees of this country. This resolution was confirmed by the government; and by the resolution of the 17th of *August* 1665, it was granted to the Jews to marry and to make wills: their wills were interpreted according to the common law, and, in cases like the present subject, there existed with regard to them no special law. Herewith I am of opinion to have answered the query propounded in the case, what was the law of *Holland* in 1693, 1695, and 1696, with regard to Jews, respecting the construction of the will of *Bernal*, and particularly respecting the property mentioned in the marked clauses.

"It is further mentioned in the case that, in regard to the marked clauses or items in the said copy will, a doubt or question arises whether, according to the true construction of the terms there made use of by the testator,—which are "the race of my father," "our heirs and near kindred," "our family," "descendants or near kindred," and "our relations"—both males and females

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are to participate in the benefit of the fund, or whether males only are entitled, to the exclusion of females. The constructions of the marked periods appear to me to be these. It was the testator's will that the monies, remaining after the execution of his will, should be converted into a capital, the dividends and interest to be employed in holding up and increasing the capital: however the dividends and interest shall be applied for the support of the blood relations who, in the twenty-fourth marked clause, are named, when they should be reduced to want, viz., *Jacob Levi Ganez*, *Abraham* and *Jacob de Isaac Bernal*, *Isaac de Jacob Bernal*, *Benjamin Bernal*, *Rachel Lousado*, *Leah de Castro*, *Esther Franco*, and the children of these three women. In regard to the children of these women, the testator makes no difference, whether the children are of the male or of the female race. But in regard to the four above named men, the testator limits the support to their male children only. Further, the testator names also, as being able to make a claim on the support, *Leah*, *Rachel*, and *Esther*, of *Jacob Bernal*, and their children, — again, without difference whether these children are of the male or of the female race. The testator fixes also that should female Jewish orphans, children of his generation, get married, 1000 guilders is to be paid to them out of the said interest, which is to be decided by the votes of the executors, and of the grandsons and great grandsons of the race of the testator's father, and who are Jews. In the clause twenty-nine, the testator nominates his executors, and also particularly with regard to the just mentioned disposition; namely, *Jacob Levi Ganez* and *Abraham Bernal*: to these he gives the power to appoint at their decease others in their place to be executors and administrators of the capital. The testator charges his executors to choose for their successors able persons out of their heirs

heirs and nearest blood relations. The executors are to judge who they shall deem the most fit to be their successors, from the heirs and nearest blood relations. This choice, according to my opinion, cannot be attached as long as it only takes place from the heirs and nearest blood relations of the testator, or of *Jacob Levi Ganez* and *Abraham Bernal*. The testator also makes no difference whether these administrators who succeed the executors are men or women. The stipulation there appearing that the proceeds are to be applied for the necessities of those of "the race of my father," whom the executors or their successors shall consider entitled to the assistance, can, in my opinion, not derogate from that which the testator in No. 25 more particularly and strictly has stipulated with regard to that support. These stipulations stand in the foreground, and must be observed; they shew in what sense the words, "the race of my father" ought to be taken. In the twenty-ninth clause, the testator treats more particularly about the executors; but the persons who can make a claim on the support are mentioned in No. 25. That which is mentioned at the end of No. 29, in regard to the children of *Benjamin Bernal*, must therefore be again considered as in connection with No. 25, where only the male children of *Benjamin Bernal* are declared to be entitled to the benefit of the fund. That which appears in No. 29, that they are to have greater assistance in the adversity which the descendants or relations should or might sustain, must be considered in connection with that which immediately precedes. The testator hopes, namely, that other relations will increase that stock. Those who do so can in that case also settle who of the descendants or relations ought to be assisted, whether the women are to be excluded, or whether they are included in the denomination of descendants. But in regard to the fund established by the testator, he makes in No. 24 very

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strict stipulations respecting the persons who ought to participate in the benefit. Therefore, it also appears to me, that the words "our heirs," and "nearest blood relations," in No. 29, cannot cause or create any doubt; for that expression concerns alone the choice of the successors (and this choice is entrusted to the executors), and by no means the persons who participate in the benefit. Herewith, I presume to have answered the meaning of the case:"

That the Master certified that, on consideration of the opinion, he found that the true construction of the will of the testator, in regard to the property, the subject of this suit, according to the law of *Holland*, at the respective times of the dates of the testator's will and of his death, as regarding the wills and testaments of persons professing Judaism domiciled in *Holland*, was such as was stated in Mr. *Delprat*'s opinion: And that he found that there was no difference with respect to such law at the respective dates of the will and of the death of the testator:

That, by an order made in these causes on the 5th of *August* 1836, on the petition of the present petitioner, *Jacob Bernal*, it was referred back to the Master to review his report of the 18th of *June* 1836, as to the domicile of the testator, and to state upon what evidence or ground he found that the testator was domiciled in *Holland* at the times of making his will and of his death, with liberty to receive further evidence thereon:

That the Master, by his report of the 7th of *June* 1837, made in pursuance of the last-mentioned order, certified, upon the evidence therein stated, that he remained of opinion that the testator was, at the times of making his will and of his death, domiciled in *Holland*:

That,

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That, by an order made by the Lord Chancellor on the petition of the present petitioner, *Jacob Bernal*, on the 15th of *August* 1837, it was ordered that the reports of the 18th of *June* 1836 and the 7th of *June* 1837 should be confirmed: and that it was declared that the male descendants of *Jacob Levi Ganez*, *Abraham Bernal*, *Jacob Bernal*, *Isaac Bernal*, and *Benjamin Bernal*, respectively, the testator's five nephews named in his will, and also the male and female descendants of *Rachel Louzado*, *Leah de Castro*, and *Esther Franco*, respectively, the testatrix's three nieces also named in his will, or such of them as were or might be reduced to want or necessity, and professing Judaism, were entitled to participate in the dividends or interest of the fund in Court; but subject to the male descendants of *Benjamin Bernal*, the testator's favoured nephew, or such of them as were or might be in want or necessitous circumstances, being preferred therein to others: and that it was referred back to the Master to inquire and state who were the persons entitled, according to such direction, with liberty to state special circumstances:

That the Master, by his report of the 31st of *January* 1838, found that the testator had no issue; but had three brothers and a sister, named *Anthony Bernal*, *Jacob Bernal*, *Isaac Bernal*, and *Abigail Bernal*, who married *Joseph Levi Ganez*: that the said *Anthony Bernal* left issue one son only, viz. *Benjamin Bernal*; and that the said *Benjamin Bernal* was the testator's favoured nephew; and that *Benjamin Bernal*, the testator's favoured nephew, died in or about the year 1717, leaving three sons only, named *Joseph Bernal*, *Isaac Bernal*, and *Solomon Bernal*; and also four daughters, named *Judith*, *Esther*, *Rebecca*, and *Leah*; and that of the seven children of *Benjamin Bernal*, the favoured nephew, six of them died without issue male,

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and that *Isaac*, the seventh, only had issue, two sons, named *Benjamin Bernal* and *Abraham Bernal*; that the last named *Benjamin Bernal* (the son of *Isaac*), had issue four sons and a daughter only, and that the sons were named *Joseph*, *Jacob*, *Isaac*, and *Abraham Bernal*, [of whom *Jacob* and *Abraham* were the present petitioners] and that the last named *Joseph* and *Isaac* were both dead, without having had any male issue; and that the petitioners, *Jacob Bernal* and *Abraham Bernal*, were now living, and were male descendants of *Benjamin Bernal* the favoured nephew of the testator, and that they were such descendants through the male line only; they being the sons of *Benjamin Bernal* the younger, who was the son of *Isaac Bernal*, who was the son of the testator's favoured nephew: and that as such male descendants, they were, according to the declaration in the said order contained, entitled to participate in the dividends and interest of the fund in Court; and that *Isaac Genesè*, *Abraham Genese*, *Sampson Genese*, *Samuel Genese*, *John Sanguinette*, *Elias Sanguinette* the younger, and *Joseph Sanguinette*, were respectively male descendants of *Benjamin Bernal*, the favoured nephew of the testator; and that they were such descendants through the female line only, being respectively the children of *Esther Genese* and *Deborah Sanguinette*, who were the daughters of *Abraham Bernal*, who was the grandson of *Benjamin Bernal*, the favoured nephew of the testator: and that the Master found that the said several claimants professed Judaism, and were in necessitous circumstances; and that, under the circumstances, the Master submitted to the judgment of the Court whether the last-named claimants were or were not entitled to participate in the dividends and interest of the fund in Court, according to the declaration contained in the order: and that he found that no claims had been brought in before him except those of the petitioners, and of *Isaac Genese*, *Abraham Genese*, *Sampson*

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*son Genese, Samuel Genese, John Sanguinette, Elias Sanguinette* the younger, and *Joseph Sanguinette:*

That the fund in Court now consisted of 7300*l.* 4*s.* 5*d.*, old *South Sea* annuities, and the sum of 872*l.* 4*s.* 9*d.* cash.

The petition prayed that the order of the 25th *March* 1833 might be discharged, or be no longer acted upon: and that the Master's report of the 31st of *January* 1838 might be confirmed, so far as it related to the claim of the petitioners, and the finding of the Master in their favour: and that the petitioners might be declared to be the only male descendants of the testator's favoured nephew, *Benjamin Bernal*, who were entitled according to the declaration contained in the order of the 15th of *August* 1837: and that, in such case, after payment of certain costs, the sum of 872*l.* 4*s.* 9*d.*, cash, might be paid to the petitioners in equal moieties: and that the dividends to arise on the 7300*l.* 4*s.* 5*d.*, old *South Sea* annuities, might be from time to time paid to the petitioners in equal moieties, during their lives, or until the further order of the Court; with liberty, on the decease of either of them, for the survivor or any other person or persons, claiming to be interested, to apply.

This petition now came on to be heard.

Mr. *Wakefield* and Mr. *Cooper*, for the petitioners, cited the decision of Lord *Eldon* (*a*) in the year 1821, in *Oddie* v. *Woodford*, a branch of the great cause of *Thellusson* v. *Woodford*, and afterwards affirmed in the House of Lords.

Sir

(*a*) See *infrà*, p. 584.

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Sir *W. Horne* and Mr. *Sidebottom*, for claimants, who were males, and were also descendants of the favoured nephew, but derived their descent in part through females.

The question now is whether our clients are not included in the term "male descendants," an expression which must be taken in its most comprehensive import, inasmuch as it is not accompanied by any words limiting its meaning; and in this view, surely, a male person may be described as a male descendant of his ancestor, although he may trace his descent through females as well as through males; and, *vice versâ*, a female person may be described as a female descendant of a particular ancestor, although she may trace her descent through males as well as through females. Thus, her present Majesty would be described as a female descendant of King *Henry* the Seventh, although there are only four females in the long pedigree by which she proves her descent from that monarch; and, on the same principle, his late Majesty would be described as a male descendant of the same king, although he derived his descent partly through the same four females.

In the Duke of *Marlborough*'s act (*5 Ann. c.* 3.), which was drawn with the utmost professional precision and accuracy, and occupied, at the time, the attention of the whole nation, it was enacted that, in default of heirs male of the Duke, the honours should go to the four daughters, in succession, and it limited estates in tail male to the daughters, and estates in tail male to their respective daughters in succession, and it then proceeded in these terms: "and for default of such issue, to all and every other the issue, male and female, lineally descending of or from the said Duke of *Marlborough*, in such manner, and for such estate as the same are before limited to the before-

before-mentioned issue of the said Duke;" so that it is admitted, that after the entire male line of the Duke and his daughters shall have been exhausted, there may be lineal issue *male* as well as female descending from him; and this shews that the term "issue male" of the Duke, is applicable to an individual claiming through the male and female line, and not through the male line exclusively.

In the case of *Oddie* v. *Woodford*, cited on the other side, the decision turned, in a great degree, upon the particular intention of the testator to be collected from different parts of his will, but principally upon the word "lineal," the expression being "eldest male lineal descendant." The Judges in that case grounded the opinion which they delivered in the House of Lords expressly upon the force of the word "lineal;" and Lord *Eldon* admitted that the word "descendants" must mean posterity of all kinds; and that is the definition that *Johnson*'s dictionary gives. *Butler* v. *Stratton* (*a*), *Pierson* v. *Garnet* (*b*), and *Crosley* v. *Clare* (*c*).

In the present case, the respondents answer both the description of "*descendants*" and the description of "*male*," and are therefore entitled to share, equally with the petitioners, the benefits given by the will. It is to be observed also that the provision in question was not made by the testator, for the purpose of keeping up the honour and dignity of his family, but for the purpose of providing comfort and succour for such members of it as might be in indigent circumstances; and, of course, that comfort and succour may be needed by descendants claiming wholly or partially through females as much as by descendants claiming exclusively through the males.

Mr.

(*a*) 3 *Bro. C. C.* 367.
(*b*) 2 *B. C. C.* 38.
(*c*) 3 *Swanst.* 320. n. See 322. n.

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Mr. *Wakefield*, in reply.

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*Feb.* 28.

*The* LORD CHANCELLOR.

It occurred to me, upon the argument of this case, that, regard being had to the domicile of the testator, and to the order of reference of the 31st of *July* 1835, it might be material to inquire whether some assistance might not be obtained, in putting a construction upon the provision in question, by referring to the law of *Holland;* but, after fully considering the parts of the will upon which the question arises, and the opinion upon the law of *Holland* which has been already obtained, I am satisfied that the question must be decided by putting a construction upon the words used, and that no reference to the law of *Holland* could afford any assistance in so doing. Mr. *Delprat*'s opinion contains some able observations upon the construction of the will, but which are as applicable to an exposition of the meaning in this country as in *Holland;* and it has not been suggested, that there are any technical rules of construction in *Holland* applicable to the words in question. Indeed, from the terms used, it is scarcely possible that there should be.

The question, therefore, to be considered, is, whether the testator intended that the qualification of persons to enjoy his bounty should be males descending through males, or males descended through females. Both sets of claimants are descended from *Benjamin Bernal;* but while the petitioners derive their descent through males, the other claimants derive through females. The testator names certain men and certain women of his family, and the *children* of the women, *and in like manner the male children of the above named men,* who

who were his nephews. He afterwards directs the proceeds of the fund to be applied to those of the race of his father, and that the fund should be preserved for the comfort and succour of his family. He afterwards speaks of the descendants or near kindred as the parties to be relieved, and declares that the children of *Benjamin Bernal* shall be preferred to others. The order of the 15th of *August* 1837 declares, that the male descendants of the men are entitled, it appearing that the law of *Holland* permitted the species of provision intended by the testator. The latter expressions, coupled with the first gift for the benefit of the males named and their male children, and the general scheme of this part of the will, prove that the testator's object was to establish a permanent provision for those whom he designated as the objects of his bounty; to effect which, the word "children" must be read "descendants:" but the qualification of being males applies to all.

The gift, therefore, is (taking the particular case which has occurred) to his nephew, *Benjamin Bernal*, and his male descendants; and such the order of the 15th of *August* 1837 declares to be the construction; the law of *Holland* permitting this species of provision for families. It must be considered, for the purpose of ascertaining who are to take, in the nature of an inheritance; the qualification to take being derived from the parties' descent; and that qualification is being *male descendants*. The general class is, descendants; the qualification of the class is, being male. To entitle any one to claim, he must shew that he is one of the favoured class; that is, one of the class of male descendants. A male, descended from a female of the family, would undoubtedly answer the description, as he would be a descendant and a male; but he would not be one of the class of male descendants.

Such

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Such would be the ordinary acceptation of the terms. In speaking of a man and his male descendants, as a class, no one would conceive the son of a female descendant as included; and such is the construction which our law has put upon the words; as "issue male," which is, in fact, the same thing as male descendants.

The case of *Oddie* v. *Woodford* appears to me to be a strong authority for the same purpose; for although the word "lineal" was much relied upon, the force of that word was to mark the class to which the party was to belong, in contradistinction to the particular description of the individual. In no other sense could the term "lineal" be of any importance, as the party must have been lineally descended, whether descended through a male or a female; but, considering the word "lineal" as indicating the class, and therefore as meaning a descendant of the male line rather than a male descendant, the House of Lords held the grandson of the testator's second son (*a*) not to be entitled. In this case, it is clear that the testator is speaking of and describing a class; which brings it directly within the principle of *Oddie* v. *Woodford*.

The Duke of *Marlborough*'s act (5 *Ann. c.* 3.) does not appear to me to assist the consideration of this question; because the words used were not only not intended to mark any distinction between males and females, but were intended to include all descendants not before described, whether male or female.

It appears to me, therefore, that the testator intended to designate the male line, as the class out of which the parties

(*a*) Being the son of a *daughter* of the testator's second son.

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parties to be benefited were to be taken, and that such is the natural meaning of the terms used, explained by the other parts of the will: and such an intention appears to coincide with the views and natural object of the testator. If, instead of providing for the male line of the family, he had intended to provide for all the descendants of the persons named, why should he have selected sons of females as objects of his bounty, and have excluded the mothers of such sons and all other females? It would have been more natural to have provided for the unmarried females of the family of *Bernal*, than for the sons of those females who might marry, and who would, therefore, properly belong to the families into which their mothers might have married.

My opinion, however, is not formed upon any speculation of what might have been the intention of the testator, beyond what he has expressed in his will. I think there is enough upon the face of the will to lead to the conclusion, that the parties to claim were to be descendants in the male line, and consequently, that the petitioners are solely entitled, according to the finding in the Master's report.

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BETWEEN

1821. *Feb.* 8. *et seq.* *April* 7. 1822. *Nov.* 9, 10. 1825. *June* 23.

HENRY HOYLE ODDIE the younger, an Infant, by HENRY HOYLE ODDIE the elder, his Father and next Friend - - - Plaintiff;

AND

Sir RALPH JAMES WOODFORD, Bart.; Sir CHARLES WILLIAM FLINT, Knt.; JOHN GEORGE WOODFORD, Esq.; CHARLES THELLUSSON; WILLIAM THELLUSSON; FREDERICK THELLUSSON; ARTHUR THELLUSSON an Infant, by SAMUEL HEYWOOD, Esq., Serjeant at Law, his Guardian; the said SAMUEL HEYWOOD; WILLIAM MANNING, Esq.; HENRY, Lord Bishop of NORWICH; JOHN Lord RENDLESHAM; and Sir ROBERT GIFFORD, Knt., his Majesty's Attorney-General, - - - Defendants.

The designation of "eldest male lineal descendant," held to be inapplicable to a male person claiming in part through a female.

*PETER THELLUSSON*, at the time of making his will hereafter stated, had issue three sons, *Peter Isaac*, *George Woodford*, and *Charles*, and three daughters. *Peter Isaac*, the eldest, had then issue three sons and two daughters. *George Woodford*, who had been married about seven years, had then issue two daughters. *Charles* had not then any issue. *Peter Thellusson* made his will on the 2d of *April* 1796, and, after several other devises and bequests, gave and bequeathed all his manors, messuages, lands, tenements, and hereditaments at *Brodsworth*, and certain other places in the county of *York*, and the advowson of the church of *Marr* in that county, and all the lands and hereditaments for the purchase whereof he had entered into any contracts in writing, with the benefit of such contracts and all other his

his real estates, unto and to the use of *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, their heirs and assigns, upon the trusts thereinafter declared. And as to the residue of his personal estate, he gave the same to the same trustees, upon trust that they should, as soon as conveniently might be after his decease, invest the same in the purchase of real estate of inheritance, upon the trusts thereinafter mentioned. He then declared the trusts as follows: — "And I declare and direct that the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, their heirs and assigns, shall stand and be seised of my said manors or lordships, messuages, lands, tenements, and hereditaments, and real estate hereinbefore to them devised, and of and in the said freehold and copyhold estates hereinbefore by me directed to be purchased as aforesaid, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same; that is to say, upon trust that they, the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall, from time to time, during the natural lives of my sons, *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*, and of my grandson *John Thellusson*, son of my said son *Peter Isaac Thellusson*, and of such other sons as my said son *Peter Isaac Thellusson* now has or may have, and of such issue as my said grandson *John Thellusson* may have, and of such issue as any other sons of my said son *Peter Isaac Thellusson* may have, and of such sons as my said sons *George Woodford Thellusson* and *Charles Thellusson* may have, and of such issue as such sons may have, as shall be living at the time of my decease, or born in due time afterwards, and during the natural lives and life

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of the survivors and survivor of the several persons aforesaid, collect and receive the rents and profits of the manors or lordships, messuages, lands, tenements, and hereditaments hereinbefore by me devised, and so to be purchased as aforesaid; and do and shall, from time to time, lay out and invest the money to arise from such rents and profits in such purchases as I have hereinbefore directed to be made with my said personal estate; and so, from time to time, do and shall collect and receive and lay out and invest the rents and profits of the manors or lordships, messuages, lands, tenements, and hereditaments hereinbefore by me devised, and to be purchased as last aforesaid, in the manner hereinbefore directed with respect to the rents and profits of the manors or lordships, messuages, lands, tenements, and hereditaments hereinbefore by me devised, and to be originally purchased as aforesaid." The will then empowered the trustees to cut down timber and grant leases, and otherwise act in the management of the estates as their own property; and then proceeded as follows:—"And I do hereby direct, that after the decease of the survivor of the said several persons during whose lives the rents and profits of the manors or lordships, messuages, lands, tenements, and hereditaments hereinbefore by me devised, and so to be purchased as aforesaid, are hereby directed to accumulate as aforesaid, an equal partition shall be made by my said trustees, or the survivors or survivor of them, and the trustees to be appointed as hereinafter mentioned, of the manors or lordships, messuages, lands, tenements, and hereditaments hereinbefore devised, and so to be purchased from time to time as aforesaid, and the whole thereof divided into three lots of equal value, or as near thereto as possible, and that the premises contained in one of such allotments shall be conveyed to the use of the eldest male lineal descendant then

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then living (and who shall be entitled to the first choice of such allotments) of my said son *Peter Isaac Thellusson* in tail male, with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living, (who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited,) of my said son *Peter Isaac Thellusson*, successively in tail male; with remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of my said sons, *George Woodford Thellusson* and *Charles Thellusson*, as tenants in common in tail male, in the same manner as hereinbefore directed with respect to the eldest and every other male lineal descendant and descendants of my said son *Peter Isaac Thellusson*, with cross remainders between or among such male lineal descendants as aforesaid, of my said sons, *George Woodford Thellusson* and *Charles Thellusson*, in tail male; or in case there shall be but one such male lineal descendant, then to such one in tail male, with remainder to the use of the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, their heirs and assigns for ever; upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same: and that the premises included in one other of such allotments, and which shall compose the same, shall be conveyed to the use of the eldest male lineal descendant then living (who shall likewise be entitled to the second choice of such allotments) of my said son *George Woodford Thellusson*, in tail male; with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living (who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited), of my said son *George Woodford Thellusson* successively,

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cessively, in tail male; with remainders in equal moieties to the eldest and every other male lineal descendant or descendants then living of my said sons, *Peter Isaac Thellusson* and *Charles Thellusson*, as tenants in common in tail male, in the same manner as is hereinbefore directed with respect to the eldest and every other male lineal descendant or descendants of my said son *George Woodford Thellusson*; with cross remainders between or among such male lineal descendants as aforesaid, of my said sons, *Peter Isaac Thellusson* and *Charles Thellusson*, in tail male; or in case there shall be but one such male lineal descendant, then to such one, in tail male, with remainder to the use of the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, their heirs and assigns for ever, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same."

Then followed a similar clause for the remaining allotment, to be conveyed to the use of the eldest male lineal descendant then living of his son *Charles Thellusson*, in tail male, with remainders over. He then proceeded,—"And I declare and direct that the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, their heirs and assigns, shall stand and be seised of the manors or lordships, advowson, right of patronage and presentation, messuages, lands, tenements, and hereditaments, and real estate hereinbefore by me devised, and so to be purchased as aforesaid, upon failure of male lineal descendants of my said sons, *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*, as aforesaid, in trust to make sale and dispose of all the said manors or lordships, advowson, right of patronage and presentation, messuages, lands, tenements, and hereditaments, and real estate, either together or in parcels, unto any person or persons whomsoever, for the best price

price or prices in money that can be reasonably had or gotten for the same." The testator then declared that the trustees' receipts should be good discharges, and proceeded; — " And I declare and direct that the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, their heirs, executors, administrators, and assigns, do and shall pay the money to arise and be produced from the sale or sales of my said manors or lordships, advowson, right of patronage and presentation, messuages, lands, tenements, and hereditaments, and real estate hereinbefore devised, and so to be purchased as aforesaid, unto his Majesty, his heirs and successors, Kings and Queens of *England*, to be applied to the use of the Sinking Fund, in such manner as shall be directed by act of parliament.

" And I declare and direct that in the mean time, from and after such failure of male lineal descendants of my said sons, *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*, as aforesaid, and until the sale or sales hereinbefore directed to be made of my said manors or lordships, advowson, right of patronage and presentation, messuages, lands, tenements, rents, hereditaments, and real estates hereinbefore devised, and so to be purchased as aforesaid, shall have been made and executed, the rents and annual profits thereof shall be applied and disposed of in the same manner and for the same purposes as the interest of the money to arise and be produced by such sale or sales would, after such sales, be payable or applicable to, by virtue of the trusts and directions of this my will, in case such sale or sales were actually made and executed."

And after empowering his trustees to continue and to lay out the trust monies, on securities, for the purpose of accumulation, until proper purchases of land

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could be made, and authorising them to reimburse themselves the amount of their expences, and to appoint new trustees, the will proceeded as follows: —

"And with respect to the said advowson, and any other advowson, right of patronage and presentation belonging to any other estate that may hereafter be purchased by my said trustees, or the survivors or survivor of them, or any future trustees or trustee to be appointed as hereinbefore mentioned, I order and direct that my said trustees do and shall, when and as the same shall respectively be or become void or vacant, present a fit and proper person thereto, who shall for that purpose be nominated by one of my said sons in rotation, the eldest having the first nomination, and the like nomination to be made by the eldest male lineal descendant of my three sons respectively, in the order and rotation aforesaid, if he be capable by law of making such nomination, when the church becomes vacant, or in due time afterwards; otherwise the eldest male lineal descendant of the next brother is to present to such living. And in case it shall so happen that, when such living or livings shall respectively become void, or in due time afterwards, no male lineal descendant of any of my said sons shall be capable of presenting thereto, I direct my said trustees or the survivors or survivor of them, or such future trustees or trustee for the time being, to present to such living or livings respectively."

"I order and direct, that from the respective time or times any person or persons shall become entitled either to any part, share, or proportion of the aforesaid estates and premises, as well those hereby devised as what may hereafter be purchased in manner aforesaid, or to the whole thereof, he and they, and all claiming under him and them respectively, shall from thenceforth

thenceforth thereafter at all times severally and respectively use the surname of *Thellusson* only: and in default thereof, I order and direct that the said several manors or lordships, advowson, messuages, lands, tenements, hereditaments, and real estate, hereinbefore devised and to be purchased as aforesaid, shall be thereupon sold and disposed of by the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, and the survivors and survivor of them, and the said trustees hereafter to be appointed as aforesaid, and that the money to arise and be produced from the sale or sales thereof be paid unto his Majesty, his heirs and successors, Kings or Queens of *England*, to the use of the Sinking Fund, in such manner as shall be directed by act of parliament."

Then followed a clause in the words following;—.

"As I have earned the fortune which I now possess with industry and honesty, I trust and hope that the legislature will not in any manner alter my will, or the limitations thereby created, but permit my property to go in the manner which I hereby dispose of it." And he appointed the said trustees and his wife executors of his will.

On the 27th of *July* 1797, the testator died. *Peter Isaac* the testator's eldest son (afterwards Lord *Rendlesham*) was then alive, and had living three sons, *John*, *George*, and *Henry*; and his wife, being then pregnant, shortly afterwards gave birth to twin sons, named *William* and *Frederick*. He had also two daughters, *Frances* and *Caroline*, living at the testator's decease, and he had two other sons, *Edmund* and *Arthur*, afterwards born, and consequently not included among the lives during which the accumulation was to subsist. Before the institution of the present suit *Peter Isaac* Lord *Rendlesham*

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and his sons, *George*, *Henry*, and *Edmund*, and his daughter *Frances*, had died, and *John*, Lord *Rendlesham*, his eldest son, had had issue two daughters.

The testator's second son, *George Woodford*, was living at his father's decease, and had issue two daughters, named *Marianne* and *Georgiana*. He died in the year 1811, without having had any other issue. *Marianne*, his eldest daughter, was unmarried at the time of the institution of this suit. *Georgiana*, his younger daughter, married, in *February* 1813, *Henry Hoyle Oddie*, and had issue a son, named *Henry Hoyle Oddie* (the Plaintiff), born on the 31st of *January* 1815, and another son, named *George*, and several daughters.

*Charles*, the testator's third son, died in the year 1815. He left one son, the Defendant *Charles Thellusson*, who was born shortly before the testator's death, and also a daughter and two sons, *Alexander Robarts* and *Thomas*, born since, and not included among the lives during which the accumulation was to continue. The Defendant, *Charles Thellusson*, married in the year 1820, but at the time of the institution of this suit had no issue.

Some time after the testator's decease, two suits were instituted in the Court of Chancery respecting his will; one of them was a suit by his widow and children against the acting trustees and executors of his will, and against the two sons of *Peter Isaac Thellusson* (afterwards Lord *Rendlesham*) born after the testator's decease, and also against the Attorney-General, praying to have the trusts of the will declared void, and the real estate conveyed to *Peter Isaac Thellusson*, as heir at law of the testator, and the personal estate divided among the Plaintiffs, according to the statute of distributions. The other suit

was

was instituted by the acting trustees and executors of the will of *Peter Thellusson* against all the other persons who were parties to the first suit, praying that the trusts of the will might be established and carried into execution, and that the necessary directions might be given for that purpose. (*a*) Both causes came on before Lord *Loughborough*, on the 5th of *December* 1798, and were heard by his Lordship on that day and several subsequent days. On the 19th of *February* 1800 his Lordship pronounced his decree in both causes, and thereby dismissed the bill in the first-mentioned cause, so far as it prayed that the limitations and dispositions contained in the will of *Peter Thellusson*, of and concerning his real estates, the general residue of his personal estate, and the rents, issues, and profits of such estates, and the trusts thereof, might be declared void: and in the second cause it was declared that the will ought to be established, and the trusts of it performed and carried into execution; and that the devises and limitations of the estates contained in the will were good and valid in law; and the decree gave directions accordingly. This decree was afterwards affirmed on appeal to the House of Lords. (*b*)

On the births of such of the sons of *Peter Isaac* Lord *Rendlesham* and *Charles Thellusson*, as were born after the decree, bills were filed by the trustees making them parties to the suits and proceedings; and a bill was also filed after the birth of the Plaintiff in the present cause, for the purpose of making him a party.

Various proceedings were had in the suits, and several new trustees were appointed and were made parties by sup-

(*a*) See *Thellusson* v. *Woodford*, 4 *Ves.* 227.

(*b*) See 11 *Ves.* 112.

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supplemental suits, and many purchases were made, including some advowsons.

At the time of the institution of the present suit, the testator had been dead upwards of twenty-four years. There were four *cestui que vies* living, on the death of the survivor of whom the period of accumulation would cease. Of these the eldest was about thirty-five years of age; and of the three others, one was twenty-four, and two were twenty-three.

Five livings, the advowsons of which belonged to the testator at the time of making his will, and at the time of his death, or were purchased by his trustees after his death, had become vacant. *Peter Isaac* Lord *Rendlesham* nominated, on the first vacancy; the testator's son *George Woodford Thellusson* nominated on the second; the testator's son *Charles Thellusson* nominated on the third; and the present Lord *Rendlesham*, as eldest male lineal descendant of his father, the testator's eldest son, who was then dead, nominated on the fourth; and the clerks so nominated were presented by the trustees, and duly instituted and inducted to the livings. The right of nomination on the fifth vacancy was the subject of particular question in this cause, which involved the general question of the right of nomination. This fifth vacancy happened on the resignation, in the month of *January* 1820, of the Rev. *Harrison Prichard*, clerk, the incumbent of the perpetual curacy of *Butley*, in the county of *Suffolk*, the advowson of which had been purchased by the trustees of the testator's will. The Plaintiff claimed to be entitled, as eldest male lineal descendant of the testator's second son *George Woodford Thellusson*, to nominate a clerk to be presented by the trustees to the curacy; and the same right being also claimed by the Defendant *Charles Thellusson*, as eldest male lineal descendant of the testator's third

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third son *Charles Thellusson*, the Plaintiff filed the present bill against the above named Defendants, (not including *Alexander Robarts* and *Thomas*, the two after-born sons of the testator's son *Charles Thellusson*, who were both in *India*,) praying that the Plaintiff, as the eldest male lineal descendant of *George Woodford Thellusson*, might be declared to be entitled, according to the rotation and course of nomination established by the testator's will, to nominate clerks to be presented to the livings or benefices, the advowsons or rights of patronage of which were parts of the testator's estates devised by his will, or had been purchased pursuant to the trusts of such will; and particularly to nominate a clerk to be presented, or admitted, or licensed, for the present turn, to the perpetual curacy of *Butley*; and that the Defendants Sir *Ralph James Woodford*, Sir *Charles William Flint*, and *John George Woodford*, as the present trustees of the testator's will, might be decreed from time to time to present or nominate to the said benefices or livings accordingly, and particularly, for the present turn, to present or nominate to the Defendant, the Bishop of *Norwich*, such fit and proper clerk as the Plaintiff should nominate, to be admitted and instituted or licensed to the perpetual curacy; and that, in the mean time, the Defendants Sir *R. J. Woodford*, Sir *C. W. Flint* and *J. G. Woodford* might be restrained from presenting or nominating, for the present turn, to the perpetual curacy any clerk other than such clerk as should be nominated by the Plaintiff; and that the Defendant, the Bishop of *Norwich*, might be restrained from admitting, instituting, or collating, or nominating, for the present turn, to the perpetual curacy, any clerk other than such clerk as should be nominated by the Plaintiff, and from taking advantage of any lapse of the present turn of the perpetual curacy, or any future turn which might occur during the pendency of the suit.

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The cause was heard before the Lord Chancellor (Lord *Eldon*), on the 8th of *February* 1821, and several subsequent days.

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*The* LORD CHANCELLOR (ELDON), after stating those parts of the will which have been already quoted, proceeded as follows (*a*) :—

Foreseeing that, perhaps, all the world would think this was a will that should have been put into the fire, if the law would allow it to be so, the testator goes on to say, "As I have earned the fortune which I now possess with industry and honesty, I trust and hope that the legislature will not in any manner alter my will, or the limitations thereby created, but permit my property to go in the manner which I hereby dispose of it." This hope, which is so expressed, parliament certainly has attended to; but they have taken care that no other man shall ever make such a will as this.

There being, however, an extremely strong inclination to get rid of this disposition altogether, a suit was instituted in this Court, in which it was contended, on the one hand, that the trusts of the will should be carried into execution; and, on the other, that the disposition which the testator had made of the great bulk of his property was much too remote. It was also contended that the will ought, as to the disposition he intended to make of the great bulk of his property, to be considered as void for uncertainty. The case came before this Court, I think, when my Lord *Loughborough* was Chancellor, assisted by Mr. Justice

(*a*) The reporters are indebted to the kindness of their friend Mr. *Henry Iltid Nicholl* for the means of giving Lord *Eldon*'s judgments from copies of Mr. *Gurney*'s short-hand notes.

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Justice *Lawrence*, my Lord *Alvanley*, and Mr. Justice *Buller*; and with respect to the point of uncertainty, Mr. Justice *Lawrence*, as I collect from the report (and indeed as I remember), was of opinion that it was not necessary to say any thing upon that subject, because that question would be more properly disposed of, as he thought, at a future period. I am not quite sure that he was right, but I am bound to take it so. Mr. Justice *Buller* stated the question with respect to uncertainty, as a case of no difficulty at all, — he expressed very little difficulty about it. How his opinion as to that is to be appreciated, depends, however, a great deal more upon the validity of the reasons he gives in support of that opinion, than upon any opinions of a lawyer even of such eminence as he was. Mr. Justice *Buller*, I think, seems clearly to intimate his opinion, that only male descendants claiming through males could take. My Lord *Alvanley*, —of whom I think those who remember him will say that he was a very considerable lawyer, and by those who hereafter may read his judgments I am disposed to think that he will be spoken of at least with as much respect as by those who heard his judgments; for the matter of the judgments was sometimes, if I may so say of my respected deceased friend, a little prejudiced by the manner in which they were given; but he undoubtedly was a very considerable common lawyer and equity Judge; — by his judgment he certainly intimates the concurrence of his opinion with that of Mr. Justice *Buller*; but he gives no reason. Lord *Loughborough* intimates a like opinion, but he gives no reason.

There was an appeal to the House of Lords, and upon that appeal it was found that this was not too remote. I do not recollect whether the point about uncertainty was there discussed, but certainly no judgment was given upon it. If, therefore, I am called upon, in determining who is to present to this living, to enter

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enter into considerations which can affect the question who will be entitled to take this property, the male descendants claiming through males, or male descendants claiming through females,—if I am now called upon to give an opinion upon that, — I am perfectly ready to say (and I request it may be recollected that I do say it) that, although I think myself bound by that judgment to say that there is no uncertainty in this will with respect to that question, I have not the least difficulty in saying that any thing I do in the execution of my judicial duty with respect to that question is done under the conviction that I must give my opinion; but that no man living will be more uncertain than I shall be, whether that opinion is right or wrong; and I think it right to say that; because, if this point, here decided, can in any degree affect the great question which is hereafter to arise, it ought at least to be understood what value the person who gives the opinion sets upon his own judgment, when he is called upon to decide upon a matter of such interest and importance as this, not in the present case alone, but with respect to future cases; and, therefore, I cannot help saying (and I say it with great sincerity) that, as it appears to me, this is a case which should go to the House of Lords. I desire it may go there, with a conviction on the mind of every one that the opinion that I shall give upon this case is an opinion upon which no one can set less value than I shall set, if, in the execution of my duty, I give that opinion. I am very sorry it falls to my lot to give it; and I have a strong inclination to think that more might have been made of the argument of uncertainty than has been antecedently made of it. In this way of putting it, it will appear that it strikes my mind, notwithstanding all I have heard respecting the disposition of this living, that I cannot get out of the necessity of applying to the construction of that clause what appears to me

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o be the construction of the rest of the will; and having aid thus much, I have only further to say to-day, that f the question upon the clause with respect to the disposition of this living is the same as the question with espect to who is ultimately to take the property, the reat and important question in this cause is, whether he persons to take are to be males claiming through nales, or whether they are to be males, whether they laim through males or through females: that is the state of the question; having, nevertheless, regard to the peculiarities of expression that are contained in that clause which relates to the disposition of the presentations, when they shall happen to fall. Unless in that clause, there are words which authorise you to distinguish the effect of that clause from the effect of the other clauses in the will, the question would, I apprehend, be exactly the same as if I were now informed, before this living fell vacant, that all the lives during which the accumulation was to be continued had ceased to exist. What would be the determination then (unless that clause gives rise to a different construction in the interim), must be the determination now.

I have thus far probed the subject to-day, because I am very well aware that I cannot go through all which has occurred to me upon this case, without employing a very considerable portion of time, and I have thought it, therefore, better, as it is uncertain whether I shall be able to be here on *Tuesday*, to go thus far to-day, with a view to relieving the case, that I may be able to apply myself directly to it when I come into Court on *Thursday* morning. (*a*)

*The*

(*a*) The reporters are informed that, in consequence of what fell from Lord *Eldon* upon the question of uncertainty, his Lordship's judgment was postponed for some time, upon the application of Lord *Rendlesham*, in order that that nobleman might

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*The* LORD CHANCELLOR (after stating the terms of the devise of the real estate, and the bequest of the personal estate, and the direction for accumulation, proceeded as follows):—

This clause of the will describes the period during which the accumulation is to take place; and one question upon this clause will be whether the expression "such issue," which occurs repeatedly in it, means issue male, or means both issue male and female; that is, whether the period of accumulation is to be as long as those sons, or the male descendants of those sons, were living, or whether the period of accumulation is to be, not only whilst the male descendants of the sons are living, but whilst female descendants of the sons are living also; and I observe again, repeating it in a word, that where the testator talks of the issue of the sons there are no words used to qualify that word "issue," so as to confine it to either issue male or female, or so as to let it be applicable to both. It is material to point that out to attention, because, if the accumulation is to be during the lives of female issue, it will be obvious, I think, when you come to reflect upon the subject, that it is a very possible thing that all male descendants might have failed absolutely—absolutely have failed,—that there should have been an utter impossibility of there being a male descendant at the close of the period of accumulation; and yet that the period of accumulation, under

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might have an opportunity of presenting a petition to the House of Lords, praying that the order by which the decree of the Court of Chancery in the former causes had been affirmed might be so far altered as to leave the question of uncertainty of limitation open; but that such a petition, although prepared, was not presented, and therefore Lord *Eldon* proceeded, on the 9th of *November* 1821, to give his judgment in this cause.

nder the general effect of the word "issue," qualified by he words "male" or "female," should go on during the ves of females, after the possibility had ceased to exist hat there should be any male descendant in a direct male ine; and the circumstance that such might be the case s a circumstance, as appears to me, that must be attended o in considering the meaning of that clause, which, in a uture part of the will, goes on, after the period of accumulation had been fixed and determined by this clause, o state who are the persons who are to take at the end of that period of accumulation.

The words are not the "eldest male descendant," but he "eldest male lineal descendant;" and I do not find, n any subsequent part of this will, that the person is described by the terms "eldest male descendant," but n every case in which that descendant is spoken of—let t be whom it might is intended — the words are the "eldest male lineal descendant then living (and who shall be entitled to the first choice of such allotments) of my said son *Peter Isaac Thellusson*, in tail male." It is clear, therefore, that when the person is ascertained who is to take the estate, he will take it, by the express terms of the will, in tail male; so that, with respect to his descendants after he has taken by purchase, no female descendant of his could take, and no male descendant of his claiming through a female could take.

Having described the person who is first to take, by the words "eldest male lineal descendant," he proceeds to describe those who are to take after the first and eldest male lineal descendant, by creating a succession, not by words descriptive of person, in the same manner as the words "eldest male lineal descendant" are descriptive of person, but by creating a numerical succession: for, having mentioned the first person that is to take, by the description

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description of "the eldest male lineal descendant th — living," he proceeds thus — "with remainder to t — second, third, fourth, and all and every other m — lineal descendant or descendants then living who sh — be "— Here are words likewise of description — "who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited, of my said son *Peter Isaac Thellusson*, successively in tail male; with remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of my said sons *George Woodford Thellusson* and *Charles Thellusson*, as tenants in common, in tail male." So that here you see, when the first estate was created in the person, whoever he might be, that answers that description of "eldest male lineal descendant," at the same time a remainder was to be created to *George Woodford Thellusson* and *Charles Thellusson*, as tenants in common, in tail male; so that if there had been, — during the existence of the first estate in tail male, which was given to the person that answered the description of the eldest male lineal descendant of *Peter Isaac Thellusson*, — female descendants of *George* and *Charles*, those female descendants having male issue or female issue, would not have taken under that remainder, "with cross remainders between or among such male lineal descendants, as aforesaid, of my said sons *George Woodford Thellusson* and *Charles Thellusson*, in tail male; or in case there shall be but one such male lineal descendant, then to such one in tail male, with remainder to the use of [the trustees], their heirs and assigns for ever, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared, of and concerning the same."

The next lot is to be conveyed to the use of the eldest male lineal descendant then living of his son *George*

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*George Woodford Thellusson*, in tail male, with remainder to the second, third, fourth, and so on, sons; and the words are precisely (as I read them) as they are in the clause with respect to the lot to be conveyed to the eldest male lineal descendant then living of *Peter Isaac Thellusson*. And then there follows the same creation of remainders between *Peter Isaac Thellusson* and *Charles Thellusson*, on failure of the issue male of *George Woodford Thellusson*, whose representative, whatever character he might answer, was to take an estate in tail male, not descendible, therefore, to females, or to males descending through females. However, it does not follow that, because the estate was not to descend to females or males claiming through females, therefore the first estate was not to be limited to a male claiming through a female: that consequence does not follow — it is a question upon the whole intent and meaning. The third lot *Charles* is to take; and both the clauses as to *George Woodford* and *Charles*, justify me in the observation that, in no part of the three clauses, or in any one part of the will, do the words, "eldest male descendant" alone, occur, but it is always "eldest male lineal descendant."

It was possible, however, that nobody might take under any of these limitations; and then the testator proceeds to direct that the trustees shall stand seised of the hereditaments "devised and so to be purchased, as aforesaid, upon failure of male lineal descendants of my said sons, *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*, as aforesaid, in trust to make sale." Now here, if the words had been, "so to be purchased, as aforesaid, upon failure of male lineal descendants of my said sons, *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*," I think I should have been justified in holding, as

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strongly as I before intimated I did hold upon this clause, that this clause went a long way to decide, clearly, that the persons who were to take under the words "eldest male lineal descendant," would only be males claiming through males; but I correct that, by saying that I do not think this clause alters the case at all, because, when I find the two words here "as aforesaid," I must then construe this clause with reference to the other clauses, and in conjunction with the other clauses, so as to determine what this clause means, when it speaks of a failure of issue as aforesaid; therefore we get back again to the former clauses.

[His Lordship then proceeded to state the remainder of the power of sale, and the direction as to the disposition of the produce of the sale, and then the provision in the will with respect to the advowsons.]

Upon the argument of this case before me, it has been insisted that, supposing Mr. *Oddie*, the young gentleman, the infant, to answer the description of the eldest male lineal descendant of the sons now living, still he is incapable of nominating upon the presentation that is now to be made: and, undoubtedly, I cannot deny that I have a very anxious wish, if possible, to find that that argument is well founded; and I have no difficulty in avowing the reason for that, which is this, that if the question upon this nomination could have been decided upon that point, it would have been left to others (much more capable) to decide what is the meaning of the word "male lineal descendant," long after I shall be in my grave; and because the extreme importance of the present question is this, that unless the right to nominate to this presentation can be decided upon some special ground which belongs to that particular right, the principle which

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which decides to-day who is to present to this living, will decide for that distant day who is to take all this immense property; and I should be extremely thankful to free myself from the necessity, founded on a sense of duty, to determine such a fact as this. I mention that now again, because I protest I shall enjoy no comfort if this case is not carried to another tribunal, where we may have the opinion of the Judges: I do not mean upon the direct question — because the question could not be put upon the equitable estate — but a great number of questions might be put to them by the House of Lords, which would elucidate the point. The great question is, whether the eldest male lineal descendant is to be a male descending only through males, or whether he may be a male descending through females. Taking it for granted that he may be a male descending through females, was it the intention of this testator, that a person answering that description in infancy should have a power of appointing? I observe, in a passage which I shall have occasion to cite presently, that Mr. Justice *Buller* seems to have thought that the person who settled this will did not know how to limit to an heir male by way of purchase. (*a*) The popular notion is, that a gentleman, now no more, but whom we know to have been very respectable, Mr. *Atherton*, settled this will. I think it possible he might be asked several questions by those who drew the will, to what extent the limitation might go on, and the best words of limitation; but it strikes me, from these words, that it is hardly possible that Mr. *Atherton* could have settled such a clause as this.

Then follows another clause, which is likewise a clause on which a great deal of argument has been addressed to

(*a*) See 4 *Ves.* 326.

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to the Court. "I order and direct that from the respective time or times any person or persons shall become entitled either to any part, share, or proportion of the aforesaid estates and premises, as well those hereby devised, as what may hereafter be purchased in manner aforesaid, or to the whole thereof, he and they, and all claiming under him and them respectively, shall from thenceforth thereafter at all times severally and respectively use," not take and use — but use "the surname of *Thellusson* only; and in default thereof I order and direct that the said several manors" and so on, "shall be sold and disposed of by the trustees and the survivors and survivor of them, and the said trustees hereafter to be appointed as aforesaid; and that the money to arise and be produced from the sale or sales thereof, be paid unto his Majesty, his heirs and successors, Kings or Queens of *England*, to the use of the Sinking Fund, in such manner as shall be directed by Act of Parliament."

The testator then expresses his hope that the Legislature would not interfere to destroy this will — a hope that it was not unnatural for him to express; for I believe they would have altered the will if they had not found that the will was a legal disposition of the property.

With respect to the question, whether Mr. *Oddie* is a male lineal descendant within the meaning of the clause relative to the presentation, whether the clause, or the words contained in it, will prevent his nominating to the living on account of his infancy; I think it pretty clear that this testator, or those who drew his will, had some notion of that kind — that the infancy would incapacitate him from presenting: but I do not find in this clause (at least to my satisfaction) words that will work that incapacity, if an infant could be capable of nominating, supposing

supposing the words, which have been relied on as creating an incapacity, did not form part of the clause; because, if it was his intention to take away from the infant the capacity of nominating to the living — and that might be his intention — it does not appear to me that he has gone the length of introducing words to have that effect.

Cases have been put in which an infant might not be capable by law, and afterwards become so; and upon that question I have always considered that that case which is to be found in the *Second Equity Cases Abridged* (*a*), under the title "*Infant*," is a direct authority on the subject. There Mr. *Cyril Arthington*, the Plaintiff's father, conveyed the advowson of the church of *Addle*, in the county of *York*, to the Defendants, in trust to present, upon the first vacancy, such son of Mr. *Jackson* as should be then qualified to take the same; and in case he should have two or more sons qualified, then such one as the grantor, his heirs or assigns, should, by writing under his or their hands and seals, nominate and appoint: and in case Mr. *Jackson* should not have any son of an age capable of being presented, then upon trust to present such person as the grantor, his heirs or assigns, should, by like writing under his or their hands and seals nominate and appoint, so that such nominee should become bound in a sum to be approved by the trustees, for his resignation when Mr. *Jackson* should have a son capable of presentation; and in default of such nomination by the grantor and his assigns, that the trustees should present a person of their own choosing, under such restrictions as aforesaid. The grantor died, leaving the Plaintiff his son and heir, an infant of six months old: — then the living became vacant, and the eldest son of Mr.

(*a*) Page 518.

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Mr. *Jackson* being but fourteen years of age, the guardian of the Plaintiff took him in his arms and guided his pen in making his mark and sealing a writing, whereby one *Hitch* was nominated and appointed to the trustees, in order to be presented by them into the living: and the question was, whether this nomination by the infant was a good nomination? It was argued much at large; and Lord *King* decided it. It was not that the infant was to present, but to nominate, as it is here; and the trustees to present as they are here. "An infant of one or two years old may present at law; then, why may they not nominate? Does the putting a mark and seal to a nomination require more decision than to a presentation? The guardian is supposed to find a fit person, and the bishop is to confirm his choice," and to determine that he is a fit person; "and if this is permitted at law, why should a court of equity act otherwise in equitable estates? Accordingly it was held that that was a good nomination."

The question therefore here will be, not merely whether, if the nomination was made by an infant, it would be good, but whether, under the effect of this clause, it would be good. I think the clause has not gone far enough to create a new law in this particular case. I am bound, therefore, to say that I cannot find my way out of the case, without being under the necessity of looking a little further. It became necessary to have the opinion of this Court, and afterwards of the House of Lords, upon the validity of this will; and it is not immaterial, I think, to point out some passages, both in the arguments of counsel, and likewise in what was stated by the Court, when my Lord *Loughborough* heard the cause, with the assistance of Mr. Justice *Lawrence*, Mr. Justice *Buller*, and the then Master of the Rolls, who I take to have been Sir *Richard Pepper Arden*, after-

afterwards Lord *Alvanley;* because, upon this question, what the words "eldest male lineal descendant" mean, there appears to have been at the bar, naturally enough, some discussion, and from the bench some declaration of opinion, though I cannot help thinking myself the judgment of Mr. Justice *Lawrence*, with respect to this point, was the most strictly and purely judicial of any opinion that has been given.

[His Lordship read extracts from the judgments of Mr. Justice *Lawrence* and Mr. Justice *Buller*, and Lord *Alvanley* and Lord *Loughborough* upon the question of uncertainty, and then proceeded:]

You all recollect that the will was established, and, being established, no question has arisen upon the construction of it till this matter happens of the vacancy of this presentation. Now, if Mr. Justice *Buller* was of opinion, that there was no difficulty in this construction; if Lord *Alvanley* was of opinion there was no difficulty; if Lord *Loughborough* was of opinion there was no difficulty, in every way in which he could put the case to himself, I certainly have the more to lament, that it falls to my lot to decide; because, though I have formed an opinion upon it, and must act on my opinion, I cannot say this is not a case of considerable difficulty. I think it is a case of considerable difficulty.

The first question that arises in the determination of it is, during what period is the accumulation to go on? and having given my opinion upon that part of the case which relates to the infancy of Mr. *Oddie;* and being about now, in a few words, to give my opinion upon the question, during what period the accumulation is to go on—which is a question, an opinion upon which I think must be formed before you are to ask, who are

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the persons to take, — I shall, upon this case, stop there, going on with the remaining question, who are to take, to-morrow morning; because I am quite sure I cannot go through that part of the case with the extreme accuracy and precision which I think belongs to the due discussion of it.

What is to be the extent of the period of accumulation, as bearing upon the second question, depends entirely, I apprehend, upon the meaning of the word "issue," in the clause which relates to the accumulation; and I know of no rule whatever, which would prevent my holding that the word "issue" does mean issue male, and does mean issue male only; — if the context of this will, if all that occurs, as Lord *Kenyon* used to express it, within the four corners of the will, would authorise me to say it must have been the intent of the testator by that word to exclude female issue, and to include only male issue, — and I am ready to go the length of saying, I cannot well represent to myself how it happened, that this testator should take the fancy of not mentioning his own daughters as his female issue, and yet should mean to include in the period of accumulation, the lives of the females whose lives must be included, if that word "issue" includes both male and female; but at the same time I must say I cannot find enough in the whole context of this will, to say that the word "issue" in that clause means only male issue; and my opinion upon that clause is, that the accumulation is to go on as long as there are female issue of the persons there described, as well as male issue of the persons there described; and that leads me to acknowledge one difficulty, as arising in a case which was thought a case of no difficulty, out of this consideration, that it is extremely possible, — and I doubt, from my own memory of the case, (and I ought to recollect it well, both at the bar and in the House of Lords but

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but I do not recollect, speaking from my own memory,) that the circumstance which has been alluded to at the bar, and which I am about to allude to, was much pressed, if mentioned in the consideration, certainly not much pressed — that it might happen that all the three sons might have died, without any male issue, in ten years after the death of this testator, and yet that there might be females — if this be the true construction of the word "issue" to include both males and females — who might live for sixty or seventy years after no male descendant could possibly exist, unless it was a male descendant claiming through a female; and yet, according to the frame of this will, the accumulation is directed then to go on for (upon that hypothesis) sixty or seventy years after it has become impossible that there could be a male descendant claiming entirely through a male; and when, upon that hypothesis, at the end of the period of accumulation, there could be nobody to take under that exposition and construction of the words, "eldest male lineal descendant." Whether that difficulty is a difficulty that can or cannot be got over — what is the meaning of the words "eldest male lineal descendant?" Proceeding upon a question of such importance, and requiring such nicety of expression, I shall not proceed further upon that point of the question, but deliver the opinion I have formed upon that when I come into court to-morrow morning.

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*The* LORD CHANCELLOR.

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In stating yesterday what had occurred in the course of the argument in former stages of this cause, with reference to the question, — whether a male, descended through a female, was to take under this description; or whether a male descended through males (that is, through

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through a male line entirely), is the only person to take? the object of the argument upon these questions, so far as it was addressed both to the Court here and to the House of Lords, was to prove that the meaning of the description was too uncertain to give any body a title, and that therefore the will ought to be considered as a will that was void for legal uncertainty. It is hardly necessary for me to observe that, if it could be made out that there is too much legal uncertainty, whether a male deriving under a female can take, or whether a male deriving through males is to take, that way of considering the case would put an end to the present claim; because the present claim can only be made upon the notion that the will affords sufficient of legal certainty to entitle the person who claims to take: therefore, giving the opinion which I am about to give, I do it certainly without prejudice to any question which may hereafter arise elsewhere, whether there is or is not sufficient legal certainty to entitle the one or other species of descendants to take; but, for the present purpose, I assume there is sufficient certainty in the description of somebody to take.

It is not unnecessary to intimate so much as that, because it perhaps might be contended, with considerable effect, that there is more of uncertainty with respect to this clause, as to the presentation, than there is with respect to those who are to take the property when the period of accumulation shall cease. But it is impossible to deny that there is at least as much of uncertainty in respect to the question, who is to have the presentation, as there is with respect to the question, who is to take the property when the accumulation is to cease. I mean who of those species of descendants is to take the property; not forgetting it has been stated, over and over again, by those who should speak only the language of

of judgment, that, at any rate, the Crown would take. The view that I take of it at present is, that the same person will be now entitled to the presentation, who would be entitled to take the first estate in tail male, if at this moment the accumulation had ceased.

Having said thus much about uncertainty, the next question is,—how far cases bear on this subject: and I have looked into every case I could think of that appeared to me to be a case that ought to be attended to; but I cannot bring myself to think any cases to which either I have been referred in argument, or to which I have been referred by what I have read on the subject, are cases that bear so strongly upon this will as to induce me to say that I can, upon any authority that they furnish, alter the opinion which I have formed from the nature of the will. The provisions of the will, and the context of the will, being all taken together, — and indeed it may be very truly said, that where there is so extraordinary a will as this, the case is *sui generis*— it is next to impossible to find any authority for the construction of them, always remembering you are to be guided by those great principles and rules and canons of construction which are to be applied to the construction of all such instruments.

The accumulation is to go on as long as the testator's sons, or any sons of the testator's sons, living at his death, or any issue of such sons of the testator's sons living at his death, should continue; and I mentioned yesterday that though it might be, and likely enough was, the intention of this testator, by the word "issue," to mean only male issue, I cannot, attending to those principles and rules and canons of construction, say it means only issue male, without prejudice to what may be the effect of future consideration here or elsewhere.

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I say that I take the case at present as a case in which the accumulation is to be made as long as the testator's sons, or any sons of the testator's sons, living at his death, or any issue male or female of the testator's sons should continue. I should mention here, as a fact in the case, that the testator himself had daughters; and that, as far as I understand his will, he makes no provision in the succession to these estates for any issue of those daughters, either male or female; so that his own issue female, I mean his immediate issue female, and the issue female of the immediate issue female of himself, were to have no benefit whatever by the will; and that is, in my judgment, a strong circumstance.

The conveyance to be made is directed to be made in these words; and here I take notice again, in order that it may be seen whether I am accurate or not, that after the testator has once mentioned the words "eldest male lineal descendant," in no part of his will, either before or after, does he ever use the words "eldest male descendant" only; but in every part of his will he inserts the word "lineal" between "male" and "descendant." Now I take it to be one rule in the construction of a will, that you are not to impute to a testator, unless the context requires it, that he uses additional words except for some additional purpose; that you are not to suppose he uses additional words for no purpose. I mention this, the rather because I see in one of the opinions which have been given upon this case, that an opinion is given on the effect of the words "eldest male descendant" without the words "eldest male lineal descendant;" and the difference may be important, if the word "lineal" is to have any meaning ascribed to it; because it is clear, "eldest male descendant" would be quite sufficient to include all that is contended for on the part of those who insist

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insist that males claiming through females are to take, whether the word "lineal" was there or not; and therefore the question is, whether the word "lineal" was not inserted for some purpose: the words are these, "shall be conveyed to the use of the eldest male lineal descendant then living (and who shall be entitled to the first choice of such allotments) of my said son *Peter Isaac Thellusson*, in tail male, with remainder." Now the person first described, is described by a circumstance which, *primâ facie*, I admit, denotes age — *eldest*. With respect to those who are to take after him, a numerical succession is provided, as it seems to me, without one single necessarily important ingredient of age as a qualification: it is "to the second, third, fourth, and all and every other male lineal descendant or descendants then living." Then follow these words, "who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited, of my said son *Peter Isaac Thellusson*, successively, in tail male."

The three important expressions therefore in this clause of the will are, "the eldest male lineal descendant then living;" the next is, "the second, third, fourth, and all and every other male lineal descendant or descendants then living;" the third is, "who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited, of my said son *Peter Isaac Thellusson*, successively, in tail male."

The first question therefore here will be, whether this word "eldest" — having regard to the whole will, and to the nature of the provisions of it — means eldest in age at the time the conveyance is to be made. It is to be observed that by the subsequent description, those who

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who are to take after him who is called the eldest, are the "second, third, fourth, and every other male lineal descendant or descendants of *Peter Isaac Thellusson* then living;" a clause which in no word of it appears to me to have any reference whatever to relation, unless you are to imply that it means the second eldest, the third eldest, the fourth eldest, and so on. This seems to me to shew an intent to institute a succession in numerical order, independent of the age of particular individuals at the time; and I have not been able to satisfy myself, upon any reflection which I have cast upon this case, that the word "second" would mean the second eldest male in the ordinary sense of the word eldest male, or that the third could mean the third eldest male in the sense connected with the word age, or that the fourth could mean the fourth eldest male; and the words, "every other male lineal descendant or descendants," as it seems to me, cannot have any sense appropriated to them derived from the present age of individuals so described.

The question therefore will be, as I apprehend, whether, to give consistency to the whole of this description — that is, not merely to look at the general description of the first person who is to take, but to look at all the descriptions of all the persons who are to take — the word "eldest" is or not to be taken as synonymous with the word "first," when you have the words "first male lineal descendant." Still there arises the question, — who answers the description of person, as well as who answers the description of eldest? The person to whom the next is second must be the person; and if the next is second to the eldest, the eldest must be the first: the third, that which is next to the second; the fourth, that which is next to the third in the character of male lineal descendant: and, as it seems to me, no consistent sense can be given to the words "every other,"

other," unless this sense is adopted; and because the second, third, and every other were not to take as tenants in common in tail male, but successively, and being to take successively, it appears to me, the words "every other" must mean the same as if the words had been the fifth, sixth, seventh, eighth, ninth, and so on, according (as a conveyancer would express it)—to seniority of age and priority of birth. But then comes the question,—to whom is that ratio, that numerical succession, to be applied? and that brings it back again to the question, what is meant by the words "eldest" or "first" "male lineal descendant." If I were to limit an estate to a man's eldest son, with remainder to his second, third, fourth, and every other son, it would be the same as if it was to his first and every other son.

I mentioned yesterday, that after the estates were formed, it is clear there could be no descent to a male deriving through a female. I am ready to agree that that by no means affords a necessary inference, who is to take the first estate in the formation of those estates, which, when formed, cannot go to a male deriving through a female; but I cannot regard it as altogether a circumstance not to be attended to in construing such a will as this.

Before I proceed further, I readily admit what Mr. *Butler* proved from authority, and what, without authority, cannot but be admitted, viz. that descendants must mean posterity of all kinds, "in the same manner as is hereinbefore directed, with respect to the eldest and every other male lineal descendant and descendants of my said son *Peter Isaac Thellusson*, with cross remainders among them; or in case there shall be but one such male lineal descendant, then to such one in tail male;"

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male;" that is, if either *George* or *Charles* should have no such male lineal descendant,—I use the word "male lineal descendant" in the strict sense of the word,—but if the other should have a male lineal descendant, the only male lineal descendant of that one would take the whole in tail male, after you have once decided who that was; but if there were two male lineal descendants of the other, the testator did not mean a tenancy in common between the two, but he meant that the whole should go to one of the two; to which of the two is still a question that again occurs, and the question will be whether it was to go to the "eldest" or the "first" according to the just (if that be the just) interpretation of the word "eldest," the first, and then collecting who is the first according to the prior disposition. It seems to me, therefore, that this testator meant, if you read no further, and it appears much stronger if you read further, and go through the limitations, though they are in the same words to *George* and *Charles*, with remainders created by those clauses, that the testator meant a succession of estates in tail male, to be limited to certain persons described, in a certain order of succession. That order of succession is described again by the words "eldest, second, third, fourth, and every other;" those words "every other" I think (to repeat what I have before said, in a word) mean the same as fifth, sixth, seventh, &c. If "eldest" means "first," the case is clear and consistent as far as marriage and numerical succession go; and then the question is, whether "first" does or does not mean first in ordinary succession in the male line; whether the second does not mean second in ordinary succession in the male line.

Now, upon the best consideration that I can give this case, it does appear to me that "male lineal decendant" must mean a male descendant in the male line; "lineal" is

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is otherwise altogether surplusage, and it is not only surplusage introduced into the clause, but in every word of this will where the male descendant is mentioned. If the person meant was a male descendant, whether of the male or female line, that intent would have been quite sufficiently expressed by the words "male descendant" only, without the word "lineal," and yet that word is, as I have said, used in every clause of the will; and I do not think myself at liberty to hold that that word was not intended to have some additional meaning: if it is to have an additional meaning, it must be a distinct additional meaning, and the testator must have used it in order to express what the words "male descendant" alone would not have expressed. It is not sufficient to say here, that "male lineal descendant" may mean nothing more than what "male descendant" would express, because the question is whether a testator who uses both words is not (if the context and provisions, and nature of the will require you to suppose he did) to be taken to mean something more than by the other words.

Then follows the third important expression which I have mentioned, namely, the words "incapable of taking as heir in tail male;" and I have no difficulty in saying those words have been argued upon very powerfully in favour of the descendant through a female; but yet I cannot draw the conclusion from those words which has been stated in the part of the argument to which I am alluding. I think those words may be so looked at as to import the direct contrary. Whether I shall make myself understood or not I do not know; but what I have to say upon this is in writing; and I shall have no objection to hand this paper down to any body who thinks it worth attending to. The words are, "who shall be incapable of taking as heir in tail male of any of the persons to whom a prior

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estate is hereby directed to be limited;" and these words clearly shew this, that the testator meant that when an estate was limited to *A. B.* in tail male, the descendants of that *A. B.*, his sons, grandsons, great grandsons, &c., should not have an estate limited to them by way of purchase, but they were to take by descent from him. The next estate that was to be limited by purchase was an estate that must be limited to somebody, who, according to the provisions of the will, was second to him. These words, I say, must have been intended to express that the testator had this intent, that the son or grandson, or person to whom an estate tail was directed to be limited, should not take as heir in tail male by purchase, but should only take by descent — that is, that there should not be a tenant in tail male by purchase — leaving his ancestors, from whom he would take an estate in tail male by descent. But if these words had not been included in that clause, there would have arisen the question, whether he was not to have an estate tail limited to him by purchase; and perhaps the strict sense of the words, taken alone, would have shewn that he was to have an estate tail limited to him by purchase. Then, cannot this be taken to import that the testator considered the son of a person to whom an estate in tail male was directed to be limited, as the next relative to whom the words "male lineal descendant" would apply? which seems to shew what was meant by the words second, third, &c.; and it seems to imply that he meant a descendant in the direct male line, and not a male claiming through a female; for such a male would not take an estate in tail male under a will by descent.

I have before taken notice of the clause with respect to the accumulation as bearing or not bearing very essentially and importantly upon the clause with respect to

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to the description of persons to take, and I do not repeat it; but it is impossible not to see the extreme improbability that the testator had any other meaning than I impute. He excludes from the succession his daughters and their issue; he excludes all females descended from his sons: whenever the succession is to commence, after the estates are conveyed, all females and their issue male are excluded. Now, to be sure, it is not impossible that a man who, before the estates were all formed, had excluded his own female issue and all the female issue of his sons during the period of accumulation, might not mean to exclude, from ultimately taking, the daughters of his sons, although his own daughters he has totally excluded in both ways; but that is a most extremely improbable case. Well, but it is said, and certainly a great difficulty arises from that, it is said that the accumulation is to go on, not only whilst there are male issue descending through males, but it may go on while there is any female issue of his sons; and can you suppose he meant the accumulation to go on after it was impossible that any body should take during whose lives that accumulation was to go on? and can you suppose that he meant that the male issue of the daughters of sons should not take, if the accumulation was to go on during the period of the lives of their parents, and they should happen to be living after there had been a complete cesser of the possibility of having male issue of the sons? I admit it to be extremely improbable, and it creates a great difficulty in this case; but when I see here a testator excluding the sons of his own daughters, and when I see here a testator who is acting on the supposition that no such case shall take place, it appears to me you are to take the case on the other side, and ask yourself what sort of conveyance is to be made if that be the construction which includes males of all sorts

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according to their ages. It is not going a great way to say, certainly, that it is possible that Mr. *Thellusson* might take into his head what I think never entered the head of any man before, — because, having made such a will, I must admit that he did take into his head what never entered the head of any man before; but if you come to consider what kind of conveyance would be to be made on that construction, I must own I cannot help saying, that the conclusion of that part to which I have before alluded goes a long way to make me hold up my hands, and say, Could it be possible he meant this? It is true, there might be a failure of males through males before these accumulations were over; but let it be remembered what a number of other possibilities there are; there might be ten male descendants of females who happened to be born before ten males of the three sons, the great objects of this testator's bounty and attention; and would you then create ten estates tail successively in these ten descendants of females, before you made a limitation to one male descendant of his sons claiming through males? That is the highest improbability possible, except another case, that, if the ten males through females were not all older than the ten males through males, but that No. 1. of the first class was older than No. 1. of the second class, and No. 2. of the second class was older than No. 2. of the third class, and so on, can you believe — what neither Mr. *Butler*, or Mr. *Sugden*, nor Mr. *Preston*, nor any conveyancer ever saw — that you are to convey to the uncle, then to the nephew, then back to the uncle, then to the nephew, and create a state of limitations which Mr. *Thellusson* might by possibility contemplate? but if he did, he is the first man in the world who ever did contemplate it, and I do not believe any conveyancer contemplated it since his day.

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There are other reasons, which I have no objection to state. In the first place, there is the name of *Thellusson*. I do not lay so much stress on that, as other persons have done: not but that it must be brought into the scale of probabilities. There were those, now no more, — for neither Mr. Justice *Lawrence*, nor Mr. Justice *Buller*, nor the Master of the Rolls, are now in this world: there were those—who thought great stress was to be laid on that clause. As to the name, I do not say that the argument used on the difference between "take" and "use," is without effect; but it depends more on the effect of the arguments on the other parts of the will. A man cannot use the name, unless he takes it.

It is under the impressions I have received from this consideration, that, taking the whole together — looking at the descriptions, not the first, but all the descriptions — the mass of descriptions as to all, — it is my opinion that the testator meant that the first takers were to be persons who were to take as male descendants through a male descendant in a male line; and I do not see the difficulty of accomplishing that purpose, which seems to have struck other persons. I can think, without much difficulty, how the conveyance was to be moulded in every way in which it was to be put. If the great grandson, for instance, was the person who was to take under this exposition of the meaning of the words: I say that he would take an estate in tail male; that his male descendants would take by descent. I say his next brother would be the second in the order of succession, and so it would go on through that class which constitutes his family; and his family being gone, it would go to the next son, and so go through his descendants; and I think that was the meaning of this will.

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When I state this, I certainly must say that I should have been extremely glad, if it had been consistent with my duty, to retire from the duty which I have now been discharging. This is, certainly, with respect to value of property, one of the most important cases I have ever had to consider. With respect to the difficulty that belongs to the case, I cannot honestly represent my mind to be in the state in which I think Mr. Justice *Buller*'s, Lord *Alvanley*'s, and Lord *Loughborough*'s were at the time they decided. I think there is a great deal more difficulty than they apprehended belonged to it; but that may be a mistake on my part. I am, therefore, very unwilling, in my view of it, to take any step which will conclude this case; and as the question is on an injunction, I shall be glad to consider in what way to preserve that injunction, so that you may have the opinion of the House of Lords upon it, where questions may be put to the Judges, which I could not send in the shape of a case to them here; or you may have a re-hearing of this case.

It has been said, an appeal to the House of Lords, while the Chancellor is Speaker, is a mere form. It may be thought so by men who have great confidence in their own opinions, in their great talents, and in their great experience. The person who now addresses the bar has certainly come to the close of that accumulation of years during which his natural existence can continue; and I can only say that, throughout my judicial life, my mind has been hampered (and I confess it), with doubts upon many cases which would not have created doubts in the stronger minds of other men. That may have been attended with some degree of mischief; but it is, at least, a security to those who think I have fallen into error, that if they again submit any thing to my consideration, whether here or elsewhere, they will submit

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it to the consideration of a person who holds a regard for consistency in error to be a very great disgrace to him, and who wishes only to be consistent in endeavouring to be right, though he cannot act up to it without admitting he is wrong. In whatever way you think proper to reconsider this, if you think I am wrong, it will create no difficulty, as I should look at the question as if I had not heard a single word on this will.

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The decree declared that the right to present was not in the Plaintiff, and dismissed the bill, unless the Plaintiff should appeal to the House of Lords within a month after the next sitting of Parliament; and it referred it to the Master to tax all parties their costs, as between solicitor and client, and ordered that such costs should be paid out of the testator's estate.

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The Plaintiff appealed to the House of Lords within the appointed time, and Lord *Rendlesham* presented a cross-appeal, in which he insisted on his title as heir at law, on the ground of uncertainty in the devise.

The Plaintiff's appeal was supported by the following reasons.

"First. Because, according to the plain natural import of the terms, (which are not technical terms, or terms having any peculiar meaning in the law distinct from their ordinary acceptation,) the Appellant is the eldest male lineal descendant of *George Woodford Thellusson*. For, being, as is not denied, the eldest male descendant of *George Woodford Thellusson*, in him all the

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sb… …if the entire male lines of all the testator's sons should
…fail, and the survivors of the persons for whose lives the accumulation is directed to continue should happen to be females, the accumulation which would necessarily be continued during the lives of such surviving females would be wholly without object, unless the issue male of those females, or of other females derived from his sons, were to succeed to the accumulated property.

"Fourthly. Because the name clause in the will appears to have been principally, if not wholly, introduced to meet the case of a male derived from one of the testator's sons through females succeeding to the property.

"Fifthly. Because, according to the construction contended for by the Appellant, the whole scheme of the will,

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receive.

Eighthly. Because the novelty or strangeness of the
sition is no ground for departing from the literal
truction of the will, in order to produce a succession
e consistent with the usual limitations of real pro-
y.

" *Lancelot Shadwell.*
" *E. V. Sidebottom.*"

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Judges' opinion to those precise
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terms of the description unite. He is clearly a lineal descendant, a male lineal descendant, and the eldest male lineal descendant, of *George Woodford Thellusson*. The plain meaning of the words ought to be abided by, unless upon the whole will there is something amounting almost to demonstration, that the plain meaning of the words is not the meaning of the testator.

"Secondly. Because it best answers the testator's manifest views and objects, affords the greatest probability, that the peculiar scheme of his will will be carried into effect to the greatest possible extent, and best accords with that scheme and the circumstances of his family, that males deriving their descent from his sons through females as well as through males should be entitled to succeed to the accumulated property.

"Thirdly. Because, according to the directions of the testator's will, with respect to the period of accumulation, if the entire male lines of all the testator's sons should fail, and the survivors of the persons for whose lives the accumulation is directed to continue should happen to be females, the accumulation which would necessarily be continued during the lives of such surviving females would be wholly without object, unless the issue male of those females, or of other females derived from his sons, were to succeed to the accumulated property.

"Fourthly. Because the name clause in the will appears to have been principally, if not wholly, introduced to meet the case of a male derived from one of the testator's sons through females succeeding to the property.

"Fifthly. Because, according to the construction contended for by the Appellant, the whole scheme of the will,

will, however singular, is consistent and intelligible, while numerous difficulties and inconsistencies attend any other construction.

"Sixthly. Because, from the presentation clause in the will, it appears that the male descendants of the testator's sons who are to be entitled to nominate to livings are to be eldest according to seniority of age.

"Seventhly. Because the testator's will being, with respect to the disposition of his real and residuary personal estate, constitutive of a series of executory trusts, and being, in fact, merely instructions for a settlement, ought to receive a construction analogous to that which analogous expressions in an instrument creating executory trusts or instructions for a settlement would generally receive.

"Eighthly. Because the novelty or strangeness of the disposition is no ground for departing from the literal construction of the will, in order to produce a succession more consistent with the usual limitations of real property.

"*Lancelot Shadwell.*
"*E. V. Sidebottom.*"

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The following opinion (*a*) was delivered in the House of Lords by Lord Chief Baron *Alexander*, on behalf of

(*a*) The reporters are indebted to Mr. *Sidebottom* for this note of the opinion of the Judges. It will be obvious that the questions put must have stated cases differing in some respects from the precise circumstances of the present case, but it is conceived that the applicability of the Judges' opinion to those precise circumstances is sufficiently evident.

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the Judges, in answer to certain questions which had been proposed to them by the House.

(1.) We are of opinion that in the case put in the first question, the grandson of the testator's second son, being a male descendant through a male, would be entitled to nominate or present to the vacant living.

We are of this opinion, because we think the words "eldest male lineal descendant" of his three sons respectively, according to the true construction of the testator's will, designate male persons descended from such sons in the male line only. The other construction contended for is, that the testator meant to confer the power of nomination on the eldest male who was a descendant of his sons respectively, without regard to his being descended through males. If he had intended this, he would have pointed out in terms the eldest male descendant. That is the obvious and natural mode of expressing such intention. The word "lineal" would not have been introduced. On that construction it is totally useless. It was introduced, as it appears to us, in order to intimate the testator's desire that the person to nominate should be a male descendant of a son in the male line. No sense or operation can, in phrase, be given to the word "lineal," but by connecting it with "male," and giving it the sense just stated.

This construction is strongly supported by the use which the testator has made of the same words in another part of his will, where it appears to us his meaning cannot be mistaken. It is that clause in which he supposes the failure of the limitations to his family, and in that event directs his trustees to sell the estates, and pay the produce to the use of the Sinking Fund.

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By the will, when the period of accumulation shall cease, the estate being divided into thirds, one third is to be conveyed to some male, being a descendant of each of his sons; and whatever controversy may have arisen as to who shall take as purchaser, it cannot be controverted that the estate limited to every one of them, without exception, is an estate in tail male. There is, in the nature of the estates limited, nothing ambiguous or uncertain. They are, unequivocally, estates in tail male. When the testator contemplates the failure of these estates in tail male so limited, and engrafts upon that contingency the ultimate gift to the public, his mode of expressing the failure of these estates in tail male is to use the very language now in question. He says, "upon failure of male lineal descendants of my said three sons, I direct my estates to be sold," &c. The use of this phrase upon this occasion proves that the frame of the will by the words "male lineal descendants" meant descendants in the male line; for they describe the failure of an estate in tail male, which is a failure of descendants in the male line. These are convertible expressions and propositions.

We have here, therefore, an exposition, by the testator himself, of the sense in which he uses these words, and satisfactory evidence that he annexed an important meaning to the word "lineal," and that "male lineal" was intended to signify the male line.

The clause respecting the surname does not appear materially to assist either of the constructions contended for. The argument from the omission of the word "take," affords but a feeble inference that the testator conceived that such only as previously bore the surname of *Thellusson* would take his estates, because the word "use" does, in effect, every thing which the word "take"

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"take" could have done, and something more. Those who had it not could not use it without taking it.

On the other hand, the provision does not point distinctly at the succession devolving upon persons properly bearing a different family name. The direction is that they should use the surname of *Thellusson* only. This direction seems to have originated in an apprehension, that, although naturally bearing the surname, they might be induced by circumstances to unite it with another. This union he was desirous of prohibiting. This apprehension sufficiently accounts for the provision as it stands in the will, and prevents the inference sought to be drawn from it on the part of the original Appellant, viz. that the testator had in view descendants in the female line.

(2.) In conformity to the opinion upon the first question, we are further of opinion that the infant grandson of the elder brother would have a right to nominate or present, in the case supposed in the second question, to the vacant living, and not the adult grandson of the second brother. Upon this hypothesis, we think the nomination will necessarily belong to the infant grandson of the elder line, as the person unequivocally pointed out, unless the provision made by the testator for carrying the nomination into the second family, in case the descendant of the first son should be incapable by law of making the nomination, should, in the circumstances stated, have that effect. The words are, the nomination to be made by the eldest male lineal descendant of his said three sons respectively, in the order and rotation aforesaid, if he be capable by law of making such nomination, when the church becomes vacant, or within due time afterwards; otherwise the eldest male lineal descendant of the next brother is to present to such living.

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The infant grandson of the eldest son is the person clearly pointed out to make the first nomination, and we think, notwithstanding his infancy, he is by law capable of making such nomination. He, therefore, fulfils precisely all the conditions annexed by the testator to the gift of this authority, and sustains precisely the description and character of the person to whom it is given.

It has been argued that the testator, in his provision respecting legal incapacity, pointed at infancy, and that his provision is to be understood as if he had directed that the descendant of the second brother should present, if the descendant of the eldest brother was an infant. Nothing in the provision nor in the will entitles us to do such violence to the testator's language; the expression may have been used either from a doubt respecting the state of the law, as to the presentation by an infant, or to guard against the effect of other incapacities, such as lunacy or outlawry, or others that might be stated. Either hypothesis is sufficient to satisfy the provision, and to leave the words creating and bestowing the authority to their natural operation.

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1825. *June* 23.

"Ordered and adjudged, that the cross-appeal be, and the same is, hereby dismissed this House, but with liberty for the Court of Chancery to make any such order respecting costs as to that Court shall seem just. And in the original appeal it is declared, that the Plaintiff in the Court below was not entitled to any relief by his bill. And it is further ordered, that the cause be remitted back to the Court of Chancery, to proceed as the justice of the case, consistently with this declaration, may require, both as to relief and costs."

Lords' Journals, Vol. lvii. p. 1102.

## BOWES *v.* FERNIE.

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*March* 10.

Upon a motion for discovery and inspection of documents, grounded on a defendant's answer, the Court is not at liberty to disregard the statements in the answer, as to parts of the documents which are not disclosed, however suspicious those statements may be; but if they are inconsistent with each other, the Court will adopt the statement which is most favourable to the plaintiff; and if such parts of the documents as are disclosed contradict the answer as to the other parts, the Court will order an inspection of such other parts.

THE bill was filed for an account of certain pecuniary dealings and transactions, in which the Defendants had been concerned with the late Lord *Glamis*. The Defendant *Fernie* was an accountant, who had acted for a number of years in the capacity of receiver of Lord *Glamis*'s estates, and generally in the management of his affairs. By his answer he admitted that he had in his possession certain deeds, documents, books, and accounts, which related exclusively to the matters in question in the cause, and which he particularized in a schedule; and that he had also, in his possession, divers other books and ledgers (specified in the same schedule) which contained some entries relating to those matters, but which likewise contained many entries relating to other and distinct matters, and to which he had daily occasion to refer in the course of his ordinary business; and he submitted that no inspection of such books and ledgers ought to be given.

With respect to the deeds, documents, books, and papers, to the inspection of which no objection was suggested by the answer, the Vice-Chancellor, on the 8th of *June* 1837, made the common order for their production; and he further ordered that the Plaintiff's Clerk-in-Court, or solicitor, should be allowed to inspect and take extracts from the other books and ledgers at the Defendant's office, upon giving a day's notice of his intention; with liberty to the Defendant to seal up, upon oath, all such parts of them as did not relate to any of the matters in question in the cause.

Accordingly,

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Accordingly, the Plaintiff's solicitor, in the months of *August* and *September* 1837, inspected the last-mentioned books and ledgers in the Defendant's office; the Defendant having previously fastened up certain parts of them, and made an affidavit that he had fastened up such parts only as did not relate to any matters in question in the cause.

The Plaintiff afterwards moved that a more extensive inspection of those books and ledgers might be granted.

The affidavit of the Plaintiff's solicitor, filed in support of the motion, stated, amongst other things, that the ledgers which were produced to the deponent, under the order of the 8th of *June* 1837, had certain parts of them sewed up or fastened up, and that each of them contained an index to the contents, which index was one of the parts so fastened up, so that the deponent was unable to see by the index what accounts relating to the affairs of Lord *Glamis* were entered in such ledger; although the deponent believed that such indexes, if open to inspection, would be found to contain references to those accounts. The affidavit further stated, that all the items in the cash book marked E., as well receipts as disbursements, appeared, as in the customary method of book-keeping, to have been posted into certain pages in the Defendant's ledgers, the numbers of those pages being entered opposite to the items in the cash book; and that on reference to the corresponding pages in the ledgers it appeared that many of such items were so posted accordingly; but that others of them appeared to be posted into pages of the ledgers which were fastened up and not open to inspection; and that several of such last-mentioned items (which the affidavit specified) were entries relating to the accounts of Lord *Glamis*.

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The Defendant *Fernie*, by an affidavit in reply, stated that the indexes of the ledgers contained nothing relating to any of the matters in question in the cause, except the numbers of the pages in the ledgers, and that those pages themselves were left open. He further deposed, that the entries in the cash book marked E. were not entered or posted in any ledgers or books in his possession, except in a ledger marked K., which had been left entirely open to the inspection of the Plaintiff's solicitor, and which was kept by the deponent expressly for the accounts between himself and Lord *Glamis*; and that the deponent kept such part of the accounts as related to Lord *Glamis*'s estate at *Redburn*, and to various other receipts and payments made on his account, in another book, which was taken away by Lord *Glamis* in 1833, and retained. He further deposed that such entries in the cash book E. as were not to be found posted in ledger K., referred to the book so retained.

In a second affidavit the Defendant specified the particular pages which he had sewed up in his several account books and ledgers. In the ledger marked H., he stated that he had, among other pages, sewed up from page 1 to page 45, and in the ledger marked I. from page 1 to page 68, both inclusive, and that in none of the pages of the said several books so sewed up was contained any entry relating to the matters in question in the cause. In accordance with this affidavit, the indexes, and also several pages, which had on former inspections been fastened up in the body of the ledgers, were now left open.

By a subsequent affidavit of the Plaintiff's solicitor it appeared that upon an inspection had by him in

*August*

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*August* 1837, pages 35, 36, and 37 of ledger H. and page 48 of ledger I. (which were now fastened up), were open on that occasion, and that they then contained entries relative to the matters in question in the cause. The Defendant, by an affidavit in answer, admitted the fact, but stated that the pages specified had been afterwards accidentally closed, in consequence of the leaves having been inadvertently fastened up to a wrong page, and that immediately on discovering the mistake he had proceeded to rectify it.

Upon these affidavits, the Vice-Chancellor made an order, referring it to the Master to open and inspect the several books and ledgers last mentioned, and report what parts of them (if any) ought not to be inspected by the Plaintiff, and to seal up such parts only; and further, that the Defendant should produce and leave the same books and ledgers in the Master's office as the Master should direct: but the Plaintiff and her solicitor were not to inspect them without the Master's permission.

The Defendant *Fernie* now moved that this order might be discharged.

Mr. *Simpkinson*, for the motion.

The Vice-Chancellor proceeded upon the ground, that the four pages which are now sealed up were open in *August* 1837, and are sworn by the Plaintiff's solicitor, and not denied by the Defendant, to have then contained entries relating to matters in question in the cause, a circumstance which raised such a degree of suspicion as, in his Honor's opinion, warranted the reference to the Master. Suspicion, however, is no

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sufficient ground, in a case of this description, for inducing the Court to subject the whole of a tradesman's books and ledgers to the inquisitorial scrutiny of a Master. How is the Master to carry the order into effect? Is he to undertake the labour of wading through all the entries and accounts contained in these voluminous books and ledgers? The affidavit of the party is in this stage quite conclusive; *Napier* v. *Staples* (*a*), *Purcell* v. *Macnamara* (*b*), *Campbell* v. *French* (*c*). The Defendant's affidavits are merely supplementary to his answer, so that this is in fact a proceeding upon the answer; as to which Lord *Eldon* has held, and it is perfectly settled, that the statements in the answer, though open to the strongest suspicion of incorrectness, or even perjury, must, nevertheless, for the purposes of a motion founded upon it, be assumed to be true; *Clapham* v. *White* (*d*).

Sir *W. Horne* and Mr. *Lovat*, *contrà*.

The Vice-Chancellor's order was grounded upon this, that a Defendant shall not be permitted to contradict himself. If he does, the Court refers it to the Master to inquire into and state how the fact stands. If, therefore, he falsifies his own answer or his own affidavit, an inspection will be directed to be had, qualified in the manner which has been directed here. The principle of the cases referred to is, that you shall not be permitted to contradict, by extrinsic evidence, the statement of the party himself: but that principle does not apply where, to use the gentlest expression, the Defendant has convicted himself of gross incorrectness and inconsistency.

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(*a*) 2 *Moll.* 270.
(*b*) Stated in *Wigram on Discovery*, p. 209.
(*c*) 1 *Anst.* 58.
(*d*) 8 *Ves.* 35.

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*The* LORD CHANCELLOR.

If the practice of the Court, or any precedent, had been found to authorise such an order as the present, I should feel no disinclination to support it, for certainly the circumstances are most suspicious, and the Defendant's statements any thing but satisfactory. On the face of them, it was clear that the indexes must have related to the matters in question in the cause, and that fact is not now denied; and I should, therefore, have no hesitation in giving as much discovery as, consistently with the practice, I could give.

So far as the Defendant's affidavits contain statements at variance with each other, or so far as the document itself shews a discrepancy in his statements, it would be quite consistent with the rules of the Court to get at the truth by compelling the party to give discovery: and if there be now any matters which are open to that observation, either from contradiction in the affidavits, or from the character of the entries themselves, I am ready to make the order for inspection to that extent; but it is quite new to me, and no authority has been produced for holding, that an order of this sort may be directed upon an answer. It is not because you *suspect* that a defendant has stated facts incorrectly or untruly in his answer, that you are at liberty to disregard those statements. If, with respect to a particular matter, a defendant has made inconsistent and contradictory statements, the plaintiff may adopt and act upon that which is most in his own favour. But his answer may be open to every possible suspicion, and yet, according to the practice, the Court cannot reject it.

I do not think that the order can be maintained in its present shape; but as it was open to the Vice-Chancellor, upon the motion before him, to order the pro-

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duction and inspection of any books or accounts, as to which the Defendant had made contradictory statements, or as to which the documents themselves shewed a discrepancy, let any such be pointed out to me now, and I will order them to be inspected. It seems to me, however, now that access has been given to the indexes and to the four pages formerly open in ledgers H. and I., the Plaintiff has got all she can require.

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*March 23.*
*Nov. 15.*

## GRAHAM *v.* COAPE.

A bill filed against trustees, to compel the transfer to the Plaintiff of a fund to which he stated that he was solely entitled, joined, as Defendants, certain persons who had, as the Plaintiff alleged, rendered the suit necessary by calling upon the trustees to transfer the fund to them, and the bill therefore prayed that they might pay the costs of the suit.

THE bill alleged that the Plaintiff, upon the death of his wife, became entitled, under his marriage settlement, to an absolute interest in certain funds standing in the names of the Defendants, the trustees of the settlement; and it prayed a transfer of the funds, and an account of the dividends, against the trustees, and that the Defendants, *Henry Coe Coape* and *Sidney Jane* his wife, and two other Defendants similarly circumstanced, might pay the costs of the suit.

The case made against Mr. and Mrs. *Coe Coape* was, that in the event of the death of the Plaintiff's wife unmarried, Mrs. *Coe Coape*, as one of her next of kin, or in

The Defendants in question put in what they called an answer and disclaimer, in which they merely stated, that they did not now claim, and never had claimed, any interest in the fund in question.

Upon exceptions taken to this answer and disclaimer, which covered the whole of the interrogating part of the bill, the Vice-Chancellor held the exceptions good, except as to one interrogatory, which he thought was immaterial.

Held, upon appeal, that his Honor's order was right.

*Semble*, that the Plaintiff was entitled to an answer to all the interrogatories in the bill.

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in some other character, would have been entitled to a moiety or some other proportion of those funds; and that they, therefore, disputed the validity of the Plaintiff's marriage, on the ground of the incompetency and imbecility of mind of the lady: that they alleged they were entitled in such right as aforesaid, to such proportion of the funds in question; and had required the trustees to transfer the funds to them; and that the trustees had, in consequence, refused to transfer them to the Plaintiff. The bill then contained a great variety of allegations and charges, tending to shew that Mr. and Mrs. *Coe Coape* claimed some interest, and also that they had admitted that the Plaintiff's wife, at the time when the Plaintiff married her, was not imbecile or incompetent to contract a marriage, but that, in order to secure to themselves an interest in the property of which her fortune consisted, and which afterwards became the subject of the settlement, they had endeavoured in various ways to interpose obstacles to the marriage; and that, since her death, they had set up the case of her incompetency, for the purpose of preventing the Plaintiff, her husband, from obtaining a transfer of the settled funds.

The Defendants Mr. and Mrs. *Coe Coape* put in what was intituled an answer and disclaimer to the bill, in the common form, stating merely that they never had or claimed to have, and did not now claim, any right, title, or interest in the funds in question, and that they thereby disclaimed all right, title, or interest therein.

To this answer and disclaimer the Plaintiff having taken a great number of exceptions, which covered the whole of the interrogating part of the bill, the Master, upon the usual reference, reported that the answer and

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disclaimer were sufficient, and that the costs of the reference ought to be borne by the Plaintiff.

The Plaintiff excepted to the report upon both points. The Vice-Chancellor allowed the exceptions upon both points, except as to an interrogatory which his Honor considered to be immaterial, and therefore not to require any answer; and he ordered the Defendants to pay the costs of the exceptions and reference.

Mr. and Mrs. *Coe Coape* appealed against his Honor's order.

Mr. *Wigram* and Mr. *Richards*, for the Appellants.

The question is, whether the Vice-Chancellor was right in requiring these Defendants to answer the bill generally. The utmost to which the Plaintiff can be entitled, beyond what the disclaimer has given him, is an answer to all such interrogatories as apply to any facts charged against the Appellants, as evidencing or constituting an improper interference with the trustees in the execution of their trust. The circumstance of their having once given a notice to the trustees not to part with the fund, can be no ground, after they have withdrawn that notice, for charging them with the costs of the suit. Though a party cannot disclaim a liability, he may always disclaim an interest; Lord *Redesdale* (*a*), *Agar* v. *The Regent's Canal Company* (*b*), *Bulkeley* v. *Dunbar* (*c*). The case of *Deacon* v. *Deacon* (*d*), which was relied upon in the Court below, is anomalous: even there, however, the Defendant set up the claim and then withdrew it; whereas the case

(*a*) *Treat. on Pl.* 188. 283. 4th ed.

(*b*) *Coop.* 212.

(*c*) 1 *Anst.* 37.

(*d*) 7 *Sim.* 378.

case of these Defendants, as stated in their answer and disclaimer is, that they never made a claim. If the Appellants never claimed, and do not now claim any interest in the subject-matter of the suit, they might, if not made Defendants, and therefore interested as to costs, be examined as witnesses in the cause, to prove the case of the other Defendants; and the Plaintiff ought not to be permitted, by keeping them on the record as Defendants, under a pretence that they have made themselves liable to costs, to get rid of evidence which he apprehends will be unfavourable to himself.

*The* LORD CHANCELLOR.

I am clearly of opinion that the Appellants were bound to answer every interrogatory which touched the case of alleged interference for the purpose of preventing the trustees from performing their duties. If the Plaintiff wishes to carry his right higher, I must hear the argument of his counsel.

Mr. *Jacob* and Mr. *James Parker*, for the Plaintiff.

To be good, as a mere disclaimer, what is here termed an answer and disclaimer ought to have been supported by an answer meeting and traversing every allegation of fact which goes to shew that a claim was actually set up; — just as in the case of a plea, which will be overruled, unless supported by an answer negativing all such charges as, if left untouched, would destroy the plea. But, after the opinion which the Court has just expressed, the only question is, whether the Plaintiff is not also entitled, as his Honor thought he was entitled, to a full answer to every interrogatory which goes to the merits of the case made by his bill. Now, if these Appellants have so conducted themselves in the trans-

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actions out of which the suit arose as to render themselves liable to the costs, they are necessarily and properly made Defendants; and the fact that they might otherwise have been made witnesses is perfectly immaterial; *Cookson* v. *Ellison* (*a*). An answer upon the merits may furnish the Plaintiff with important information to assist him in making out his case against the other Defendants, who have not disclaimed; and should he fail in making out his title to a decree, it may still be very material upon the decision of the question of costs; for, even if the bill should be dismissed, it will by no means be a necessary consequence that the costs of the Appellants should be thrown upon the Plaintiff; *Glassington* v. *Thwaites*. (*b*) Besides, this is an answer and disclaimer put in by a husband and wife jointly; and it is very doubtful how far such a proceeding can bind a married woman, especially as regards any reversionary interest to which she may become entitled in the event of her surviving her husband; *Whiting* v. *Rush*. (*c*)

Mr. *Wigram*, in reply.

*The* LORD CHANCELLOR.

The more regular course, I think, would have been to move that the answer and disclaimer should be taken off the file; for it purports to be an answer and disclaimer to the whole bill, although, in fact, it is confined to a part of it only. The case now comes before me, however, upon exceptions, treating the whole as an answer, and I must endeavour to dispose of it as it stands.

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*The*

(*a*) 2 *Bro. C. C.* 252.
(*b*) 2 *Russ.* 458.
(*c*) 2 *Y. & Coll.* 546.

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*The* LORD CHANCELLOR [after shortly stating the circumstances of the case].

It is to be observed that the Appellants are not made defendants in respect of their having an interest, in which case a simple disclaimer would enable the Plaintiff to prosecute his suit, and give to him all the benefit he seeks. On the contrary, it alleges that they have no interest, but that, pretending to have some, they have prevented the Plaintiff from obtaining the property from the trustees; and, upon that ground, it prays that the Appellants, and the other Defendants who stand in the same situation, may pay the costs of the suit. The Appellants were quite aware that a simple disclaimer would not meet the case made against them; and they have therefore put in an answer and disclaimer, not only disclaiming all interest, but denying that they ever had or pretended to have any right, title, or interest in the property in question. But although they have found it necessary so to meet the case made by the bill, they have not answered any of the allegations by means of which the Plaintiff proposes to prove the affirmative of his proposition, and so to support his title to compel them to pay the costs of the suit.

Upon what ground can a defendant be entitled so to defeat the case alleged against him, by refusing to answer the allegations in the bill, and putting in a general denial of the equity asserted by the bill? *Glassington* v. *Thwaites* (*a*) and other cases were cited upon the point: but *De Beauvoir* v. *Rhodes*, not reported in that stage of it, more precisely meets this case. There the plaintiff filed his bill to set aside a building lease, and made the attorneys, who had been employed in the transaction

(*a*) 2 *Russ.* 458.

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transaction by the person under whom he claimed, defendants to the bill, charging that they had been parties to the alleged fraud, and had secured to themselves a benefit by getting from the tenant a contract to employ them in preparing the sub-leases, and praying that they might pay the costs of the suit. Those defendants put in a disclaimer, which Sir *John Leach*, then Vice-Chancellor, ordered to be taken off the file, upon the ground that the plaintiff prayed relief against them, and that they could not escape by simply disclaiming. In that case, as in this, the defendants were made parties upon an alleged claim of interest, and upon a demand for costs arising from imputed misconduct. With respect to the former, the disclaimer might be sufficient, but to the latter it is wholly inapplicable.

This authority appears to me to be directly in point; but no authority was, in my opinion, necessary to support the order of the Vice-Chancellor. I am of opinion that the appeal must be dismissed with costs.

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BETWEEN

SAMUEL TWYFORD and DORA his Wife, Plaintiffs; *July* 27.

AND

HENRY TRAIL (since deceased), FRANCIS TIPPING HALL (out of the jurisdiction of the Court), and JOHN MAITLAND and DOROTHEA his Wife, GEORGE AUGUSTUS SIMPSON, HENRY TRAIL SIMPSON, and RICHARD HENRY KING, - - Defendants:

AND BETWEEN

SAMUEL TWYFORD and DORA his Wife, Plaintiffs;

AND

JOHN STUDHOLME BROWNRIGG, JAMES COSMO MELVILL, and HENRY EDWARD TWYFORD, - - - Defendants.

When it is referred back to a Master to review his report, he is at liberty to receive further evidence.

BY the decree made at the hearing of the first mentioned cause, on the 20th of *August* 1834, it was (amongst other things) declared that it was the duty of *William Hall* and *James Archibald Simpson*, in the pleadings named,

A Master having found a certain sum due from certain parties, those parties took two exceptions to the Master's report, by the first of which they submitted that the Master ought not to have so found and certified as he had found and certified; and by the other of which they submitted that he ought either to have found nothing due from them, or that a certain sum, and no more, was due from them; and they, at the same time, presented a petition praying a reference back to the Master to review his report, with certain directions as to particular items of account. The Vice-Chancellor made one order on the petition and the exceptions, by which he merely allowed the exceptions, and referred it back to the Master to review his report:

Held, that, under this order, the only inquiry which the Master could make was, whether any thing, or a sum not exceeding the sum mentioned in the second exception, was due.

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named, to have withdrawn from the house of *Palmer* and Co., of *Calcutta*, the moneys belonging to the estate of the testator *George Augustus Simpson*, and that the estates of *William Hall* and *James Archibald Simpson*, respectively, were responsible for the loss which had been sustained in consequence of their having omitted to do so; and it was referred to the Master to ascertain the amount of such loss, with liberty to state special circumstances; and it was also referred to the Master to take an account of the personal estate of *George Augustus Simpson* come to the hands of *William Hall* and *James Archibald Simpson*, and an account of the personal estate of *William Hall* and *James Archibald Simpson* respectively, received by *Henry Trail*, their legal personal representative in *England*.

By the decree in the second cause, dated the 22d of *July* 1836, it was directed that the decree in the first cause should be prosecuted against the Defendants *Brownrigg* and *Melvill*, as the personal representatives of *Henry Trail*, and against the Defendant *Henry Edward Twyford*, as the personal representative of *William Hall*.

The Master, by his separate report, dated the 4th of *July* 1837, found that the loss sustained in consequence of *William Hall* and *James Archibald Simpson* having omitted to withdraw from the house of *Palmer* and Co. the moneys belonging to the estate of the testator *George Augustus Simpson*, calculating interest on both sides of the account at 4 per cent., from the 4th day of *January* 1830, the date of *Palmer* and Co.'s failure, up to the 4th day of *July* 1837, the date of the report, amounted to the sum of 13,547*l.* 10*s.* 7*d.*; and he reported that he had, in the schedule to the report, set forth the particulars of the account, by which the loss was calculated and made out.

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To this report the Defendants *Brownrigg* and *Melvill* took the following exceptions:— 1st. "For that the said Master, in and by his said report, has found and certified that the loss sustained in consequence of *William Hall* and *James Archibald Simpson* in the said report mentioned, having omitted to withdraw from the house of *Palmer* and Co. in the said report mentioned, the moneys belonging to the estate of *G. A. Simpson*, the testator in the said report mentioned, calculating interest on both sides of the account at 4 per cent., from the 4th day of *January* 1830, the date of Messrs. *Palmer* and Co.'s failure, up to the date of the said report, amounts to the sum of 13,547*l.* 10*s.* 7*d.*; whereas the said Master ought not so to have found and certified."

2d. "For that the said Master, in and by the said report, has found and certified that the loss sustained in consequence of the said *William Hall* and *James Archibald Simpson* having omitted to withdraw from the said house of *Palmer* and Co. the moneys belonging to the estate of the said testator *G. A. Simpson*, amounts to the sum of 13,547*l.* 10*s.* 7*d.* Whereas the said Master ought not so to have found and certified: but he ought to have found and certified either that no loss had been sustained by the estate of the said testator *G. A. Simpson*, in consequence of the said *William Hall* and *James Archibald Simpson* having omitted to withdraw from the house of *Palmer* and Co. the moneys belonging to the estate of the said testator *G. A. Simpson*, or that such loss amounts to the sum of 4550*l.* 9*s.* 1*d.* only, and no more."

The Plaintiffs having presented a petition, praying that this report might be confirmed, the Defendants *Brownrigg* and *Melvill* presented a counter-petition, praying

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praying a reference back to the Master to review his report, with particular declarations of the Court as to certain particular items.

On the 30th of *April* 1838, the Vice-Chancellor made an order upon the two petitions and the exceptions, which was to this effect; viz., his Honor held the exceptions to be good and sufficient, and ordered that the same should be allowed; and it was ordered that it should be referred back to the Master to review his report.

A copy of this order having been left with the Master, the Plaintiffs brought into the Master's office an amended state of facts and charge, in which, as the Defendants contended, the Plaintiffs made a different case from that which they had made in their former state of facts. This was objected to by the Defendants *Brownrigg* and *Melvill;* but, after argument by counsel on both sides, the Master determined to receive the amended state of facts.

The Defendants, *Brownrigg* and *Melvill*, now moved, before the Lord Chancellor, that the Master, in proceeding upon the inquiry and matters upon which his report of the 4th of *July* 1837 was made, and in proceeding under the order of the 30th of *April* 1838, might be directed to proceed upon the several states of facts left with him before such report was made, and upon which the same report was made, and that he might be directed not to proceed upon any amended or other state of facts; or that the Master might be directed not to proceed upon the state or amended state of facts brought in before him, on the part of the Plaintiffs, subsequently to such report.

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The *Solicitor-General* and Mr. *Cockerell*, in support of the motion.

The Master is at liberty to adopt either of the alternatives tendered by the second exception, but not to start an entirely new case. The question which arises in this case is one of general principle. It is, whether or not, according to the ordinary practice of the Court, the Master, on exceptions allowed, is at liberty to proceed as if no exceptions had been allowed. Very often the Court, when it thinks the Master wrong, makes no order upon the exceptions, but refers it back to the Master to review his report.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Stuart*, *contrà*.

The Vice-Chancellor's order, referring it back to the Master to review his report, is not appealed from, and therefore must be taken to be right. There has been a difference of opinion upon the question, whether, upon a reference back to the Master to review his report, the Master is entitled to receive further evidence.

*The* LORD CHANCELLOR.

I have always been of opinion that the Master is entitled to receive further evidence. It seems to me nonsense to refer it back to the Master, unless he is at liberty to receive further evidence; because the conclusion afforded by the evidence already taken might have been drawn by the Court without the assistance of the Master.

Mr. *Jacob*.

That is always the case upon questions of title. In one case before Lord *Eldon*, it was stated at the bar that there

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there was a difficulty in the Master's office about receiving further evidence; and Lord *Eldon* said, "Oh, if they make any difficulty about that, come back to me." The Vice-Chancellor expressly said that the Master should receive further evidence. The present motion is, at all events, clearly wrong, because it is prospective; the Defendants should have waited until the Master had made his further report.

*The* LORD CHANCELLOR.

I apprehend that, upon the order as it now stands, the Master might receive further evidence upon the issue tendered by the second exception, because he must come to a conclusion upon that.

Mr. *Sidebottom*, for another Defendant, in opposition to the order appealed from.

The *Solicitor-General*, in reply.

The Vice-Chancellor certainly thought that the Master would be at liberty to receive further evidence; but if a direction or declaration to that effect had been inserted in the order, it would have been appealed from by the Defendants who make the present motion.

*The* LORD CHANCELLOR.

I certainly have occasionally heard applications of this sort made, and undoubtedly they may have the effect of saving great expense to the parties; but I think it quite clear that it is not regular, in point of form, to give prospective directions to the Master as to the manner in which he is to proceed. It is not regular as between the parties, and I think it is not quite consistent with what is due from the Court to the Master.

If,

If, however, in this case, the parties are so agreed as to desire me to give my opinion as to what ought to be the regular course, I am very ready to give them that assistance.

Mr. *Jacob*, on the part of the Plaintiffs, intimated that he believed all parties did wish for the Lord Chancellor's opinion.

*The* LORD CHANCELLOR.

The Master, upon a reference to take a certain account — it is immaterial what account — comes to a certain conclusion, and finds a certain sum due. One of the parties files two exceptions to the Master's finding; one, that the Master ought not to have so found and certified as he has found and certified; and the other, that he ought either to have found that nothing was due, or that a sum amounting to 4550*l.* 9*s.* 1*d.*, and no more, is due. The result is, that both these exceptions are allowed. Now that, I consider, to be identically the same as if the Court had made an order declaring that the Master had found a sum due which was not the correct sum, and that he should have found either that nothing at all was due, or that a sum not exceeding 4550*l.* 9*s.* 1*d.* was due. On that declaration it is referred back to the Master to review his report. What was the Master to do? One or other of these findings ought to have taken place, viz. either that nothing was due, or that a sum not exceeding 4550*l.* 9*s.* 1*d.* was due. The Court had adjudicated upon the case so far as to decide that nothing was to be determined by the Master, but whether 4550*l.* 9*s.* 1*d.* or nothing was due. That appears to be the necessary construction of the Vice-Chancellor's order; and it is the same as if the order had incorporated the exceptions,

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tions, and had directed that the Master ought to find either nothing to be due, or a sum not exceeding 4550*l.* 9*s.* 1*d.* to be due. If those had been the terms of the order, there could have been no doubt whatever as to the extent of the Master's inquiry. As it stands, I think the Master is precluded from entering into any other inquiry than this, viz. whether anything, or whether a sum not exceeding 4550*l.* 9*s.* 1*d.*, is due.

The parties best know whether that view of the case is what the Vice-Chancellor intended. One would have expected that if the Vice-Chancellor intended, by his order, to assert the affirmative of the proposition tendered by the second exception, he would have referred it back to the Master to review his report with reference to the matter of the second exception, instead of referring it back to the Master in the general terms employed in this order.

What the Vice-Chancellor's opinion was I have no means of judging, except from the order before me.

That being my view of the case, the parties will take such course as they think fit.

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No order was made on the motion, except so far as to direct that the costs of the application should be costs in the cause.

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## ELLICE *v.* GOODSON.

*Feb.* 23, 24. 28.

A Defendant who had fully answered a bill, afterwards, upon the bill being amended, put in a demurrer to the whole of the amended bill. The bill, as amended, did not materially vary the case originally made against the demurring party, and it retained a large portion of statement which he had previously answered: Held, first, that the Court was entitled to look into the record, for the purpose of seeing whether passages existed in the amended bill, which had been previously answered as part of the original bill; and secondly, that as the fact was admitted to be so, the answer overruled the demurrer.

THIS was an appeal from an order of the Vice-Chancellor, allowing the demurrer of the Defendant *Goodson*.

The original bill was filed in *October* 1836, by the Plaintiff, suing on behalf of himself and all other specialty creditors of *James Law* deceased, the testator in the cause, for the purpose of making the testator's real estates available for the payment of his debts. The estates lay partly in *England* and *Ireland*; but consisted principally of freehold plantations, situate in the *West Indies*. Subsequently to the death of the testator, his executor, acting under a general power of attorney from the testator's heir at law, had created certain incumbrances on the *West India* estates in favour of the Defendants *Goodson* and *Young*; and the bill, besides calling for a general account of the whole of the testator's assets, both real and personal, also sought to include in the relief to be administered in the suit, an inquiry into the circumstances under which the several securities to *Goodson* and *Young* had been granted, with a view to impeach their validity, or to have them postponed to the demands of the Plaintiff and the other specialty creditors of the testator. Very shortly after the bill was put upon the file, and before the Defendants had put in answers, some slight verbal alterations were introduced into it by way of amendment. The Defendants then filed their answers, and the Plaintiff thereupon moved for the appointment of a consignee or receiver of the *West India* estates. That motion was refused. Exceptions were afterwards taken to the an-

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swer of *Goodson*, who, in the month of *March* 1837, put in a further answer, and those two answers together constituted, on his part, a full answer to the bill.

In the month of *June* 1837, the Plaintiff, under the usual order for that purpose, amended his bill to a considerable extent, but not so largely as to require a new engrossment. The amendments consisted partly in the expunging of matter which had stood in the original bill, and the striking out, as defendants, of certain parties who had been originally supposed to have some interest in the suit in consequence of claims arising out of the Slave Compensation, and partly in the introduction of new allegations and charges rendered necessary by the change of parties, and some slight alterations as to particular details in the statement. The suit was also converted into a suit on behalf of creditors generally. With these exceptions, the amended bill remained substantially the same as before; and the amendments in no respect varied the case made against the Defendant *Goodson*.

In the month of *July* 1837, *Goodson* filed a demurrer, which purported to be a demurrer to the entire record, and shewed for cause three distinct grounds, viz. want of equity, multifariousness, and want of parties.

The Vice-Chancellor made an order, allowing the demurrer, upon the second ground, and directing the Plaintiff to pay to the Defendant the costs of the demurrer, and also his costs of the suit; and he refused the Plaintiff leave to amend.

An appeal against his Honor's order now came on to be heard, and was very elaborately argued upon the merits of the different grounds of defence raised by the demurrer.

demurrer. As the judgment of the Lord Chancellor, however, did not enter into a consideration of the merits, but turned entirely upon a preliminary question of pleading, the report is confined to the argument upon that question only.

Mr. *Jacob* and Mr. *Heathfield*, in support of the appeal.

Independently of the important questions raised by the demurrer upon the merits, there is a fatal objection to the demurrer in point of form. It is not competent to a Defendant upon a bill being amended, to demur to that matter in the amended bill to which he has previously put in an answer. This, however, is what the Defendant *Goodson* has done: after putting in a full and sufficient answer to the original bill, which, as to nineteen twentieths of it, is word for word the same as the amended bill, he has thought proper, upon the filing of the amended bill, to demur to the whole bill so amended, — a bill of which he had already answered nineteen parts out of twenty. The result is, that there is now upon the file a demurrer to the whole bill, and also an answer to by far the larger portion of that to which the Defendant has demurred; and, of course, the answer, according to a settled rule of pleading, must be held to over-rule the demurrer; *Atkinson* v. *Hanway*. (*a*) A difficulty has sometimes occurred, where the amendments have been of such a nature, as to make an entirely different case against the Defendant; and there it has been thought that, in some way or other, the Defendant ought to be let in to set up a new defence; although doubts have been expressed with respect to the mode in which

(*a*) 1 *Cox*, 360.

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which that should be done; *Ritchie* v. *Aylwin.* (*a*) If such a case were alleged, the Court would look into the pleadings, in order to judge of the nature and effect of the amendments; *Grant* v. *Grant* (*b*): but nothing of the kind can be pretended to exist here. The objections raised by this Defendant by demurrer, if good for any thing, were equally available against the original bill; and the Defendant, having neglected to take them in that stage, cannot be permitted, when an amendment is subsequently made, to demur to a bill upon grounds which were open to him upon the original bill, but which he has, in fact, by his former answer, waived. It might be different, perhaps, if the demurrer were confined to such parts only of the amended bill as contained new matter, and had not been previously answered; *Law* v. *Nelthorpe.* (*c*)

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *Loftus Wigram*, *contrà*.

The proposition, supposed to be established by *Atkinson* v. *Hanway*, that a party, by having answered an original bill, has thereby lost his right of demurring to the whole of the amended bill, cannot be correct. The decision in *Ritchie* v. *Aylwin* shews clearly that, in the opinion of Lord *Eldon*, there is no such general rule. When, indeed, the question relates to one and the same unaltered record, a party cannot at one and the same time answer a question and decline to answer it; and *Baker* v. *Mellish* (*d*) and other cases have decided that a party, after he has demurred once, cannot put in another demurrer, at least upon the same ground; for that

(*a*) 15 *Ves.* 79.
(*b*) 5 *Russ.* 189.
(*c*) Cited in 15 *Ves.* p. 80.
(*d*) 11 *Ves.* 18.

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that would be a second dilatory, which is not allowed in pleading. That rule, however, has never been extended to the case of a demurrer to an amended bill. It is a fallacy to apply principles which have reference to an unaltered record, to a record which has been altered; the truth being that, in the latter case, the bill is for all purposes a new bill, and that the defence may begin over again; *Bancroft* v. *Wardour*. (*a*) That was the view taken by the Vice-Chancellor in *Robertson* v. *Lord Londonderry* (*b*) (a case which was affirmed by Lord *Brougham* on appeal), and in *Bosanquet* v. *Marsham*. (*c*) Lord *Redesdale*'s language upon this subject in his work on pleading is to the same effect. (*d*) It is settled that where the Plaintiff, after answer, amends his bill, the Defendant may vary his defence, in any way he pleases, by his further answer; and if he may do so by answer, why not by plea or demurrer? The principle is exactly the same. An executor who has admitted assets by his answer to an original bill may, if the bill be afterwards amended, withdraw that admission and make a different statement as to the assets. So, in a foreclosure suit, a defendant who has disclaimed, may, by his answer to the amended bill, get rid of the effect of that disclaimer. The contradiction, if any, is not an estoppel, but is only matter of evidence upon the pleadings, the whole of which must be taken together. It is not the practice of the Court to take upon itself the labour of going through the record, for the purpose of seeing what or how much is original matter, and what is amendment. This is the reason why, in the case of a demurrer, the part demurred to must be distinctly specified; otherwise the demurrer is bad (*e*); *Chetwynd* v. *Lindon*,

(*a*) 2 *Bro. C. C.* 66.
(*b*) 5 *Sim.* 226.
(*c*) 4 *Sim.* 573.
(*d*) Page 522. 4th ed.
(*e*) *Redesd. on Pl.* 212. 4th ed.

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*Lindon* (*a*), *Wetherhead* v. *Blackburn.* (*b*) The whole forms and is to be treated as one entire record. How is the Court to ascertain and distinguish what consists of original matter and what has been subsequently introduced by amendment, especially where the amendments have been so numerous as to require a new engrossment, and have been made at successive times? These difficulties are forcibly put by Lord *Eldon* himself, in his judgment in the case of *Ritchie* v. *Aylwin.* In such a case, the Court has no means of acquiring certain information on the subject: all, therefore, which it does or has a right to do, is to look at the record as it stands.

Mr. *Jacob*, in reply.

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*Feb.* 28. *The* LORD CHANCELLOR.

This is the case of a bill containing very long and complicated statements of matters and transactions (whether multifarious or not, I express no opinion) to which the Defendant put in an answer. The Plaintiff then amended his bill, and so far as I have been able to look, I do not find (nor indeed was it so argued) that the matter alleged to be multifarious was introduced by the amendments. On the contrary, the whole of the matter on which the objection of multifariousness is grounded is to be found in the original bill. If that be so, I do not apprehend that there is any difference between the opinion entertained by the Vice-Chancellor and that which I am about to express; for his Honor's judgment appears to have proceeded entirely upon the assumption that the multifarious matter had been introduced by amendment; and, in the present state of the question, therefore,

(*a*) 2 *Ves.* sen. 450. (*b*) 2 *Ves.* & *B.* 121.

therefore, I am not differing from his Honor upon any question of law, but have merely come to a different conclusion as to a matter of fact.

The Defendant's counsel put the case upon the ground that you must take the amended bill as the record; and that the Court is not at liberty to look into it for the purpose of seeing what are amendments and what constitutes original matter. Well, supposing that to be true, as a general proposition, what have I upon this record? I have a bill (taking the amended bill as constituting the record of the bill) which states a great variety of matters, as to by far the greater part of which there is an answer; and I have also a demurrer to the whole, that is, to all that which has been already answered. I have thus a demurrer and an answer applicable to the same bill. It is clear that if this demurrer had been now put in to the original bill, it could not have been sustained. And if I am to look at the amended bill as one record, and to look also at the answer as part of the same record, there is an answer to a part of that which the Defendant, by demurrer, says he is not bound to answer; so that the answer over-rules the demurrer.

In considering the answer to an amended bill, it is clear you must take the two answers together, the two constituting the entire answer to the bill as it exists after the amendment. The Defendant cannot justify repeating, by his answer to the amended bill, what he has stated in answer to the original bill, for it would clearly be impertinent for him to do so. He may introduce anything qualifying his former statements; but he cannot substantially repeat what he has said in his former answer, because to that there is already an answer, and all he has to do is to complete the record. He can no more demur to that which he has before

1833. before answered, than he can answer to it. This appears to be so perfectly clear in pleading and in principle, that I am very glad to learn that the Vice-Chancellor has not expressed any opinion the other way.

ELDER v. GOODWIN.

What would be the course if the circumstances were such as Lord *Eldon*, in *Ritchie* v. *Aylwin* (*a*), supposed might arise, it is unnecessary for me to consider. The case supposed by his Lordship might certainly occur; that is to say, the Plaintiff might, after answer, so amend his bill as to make an entirely new case: so that the original bill would be, as Lord *Eldon* expresses it, *in nubibus;* and, of course, the answer to it would follow the same fate. Lord *Eldon* thought he could not let in the Plaintiff to make, by way of amendment, what was virtually a new case, without also leaving it open to the Defendant, in some way or other, to avail himself of the same defence as he might have resorted to had that case been brought forward at first. One sees the justice of that, and the propriety of disposing of the difficulty, not in the way which was proposed in *Ritchie* v. *Aylwin*, viz., by motion to take the bill off the file, but as Lord *Eldon* there did, by refusing that motion, and dealing with the case upon the argument of the merits, and having regard to the record as it stood.

If, however, the case upon the amended bill is not a different, but substantially the same case, no such difficulty can arise. Accordingly, in *Atkinson* v. *Hanway* (*b*), although the Barons differed as to the mode of dealing with the objection, they all concurred in the conclusion, that if the same matter was the subject both of an answer and a demurrer, the answer over-ruled the demurrer; and that just as much where one was to the original and the other to the amended bill, as where both

(*a*) 15 *Ves.* 79. (*b*) 1 *Cox*, 360.

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both were to the amended bill. I never entertained the least doubt that such must be the conclusion, if the facts brought the case up to it. At the same time, as I proceed upon the assumption that the demurrer is over-ruled by the answer, and I have not the answer now before me, it will be necessary for me to examine the pleadings, with a view to ascertain the fact.

Mr. *Knight Bruce* admitted that material passages which were retained in the bill as amended, were covered by the answer to the original bill; but he observed, that the objection of a defect of parties was solely raised by the amendments.

*The* LORD CHANCELLOR, upon this statement, ordered the demurrer to be over-ruled, but gave the Defendant liberty to file a new demurrer, unless the Plaintiff, should, within three weeks, amend his bill by adding parties.

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## BOYS *v.* MORGAN.

*July 7.*

THE original bill, which was filed in *September* 1835, stated, in substance, that in the year 1825, *John Boys* formed a connection with *Eliza Morgan*, who shortly afterwards went to reside with him, and who continued to live under his protection from that time until his death: that she gradually acquired great influence

The following passage at the end of a will, "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire *E. M.* to do, and keep the residue for her own use and pleasure," was held, under the circumstances and upon the whole context of the will, to amount to a gift of the general residuary personal estate to *E. M.*

It is irregular to comprise in one petition of appeal an appeal against orders made in distinct suits.

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having become acquainted with his property, she formed a plan ession of it to herself; and that in plan, having by various fraudulent ed a complete ascendancy over his led upon him, in the months of *October* 1831, to transfer two several sums of in the 3½ per cents., and afterwards, in of *October* 1834, two further sums of 6317*l.* per cent. consols, and 5200*l.* 3 per cent. re- ank annuities, from his own name into hers in oks of the Company of the Bank of *England*. bill charged that at the time when such last- tioned transfers were made, *Boys* was of the age eighty-two years, and from his great age, childish imbecility, and unsoundness of mind, was wholly incapable of managing his affairs: that he died in *August* 1835 intestate; and that letters of administration were thereupon granted to the Plaintiff as one of his next of kin. The bill prayed that the transfers of the several sums of stock might be declared fraudulent and void, and that *Eliza Morgan* might be ordered to transfer them to the Plaintiff, for the purpose of being applied in a due course of administration.

On the 9th of *May* 1838, the Plaintiff filed what was termed a supplemental bill, whereby after setting forth the substance of the former bill, he stated that *Eliza Morgan* alleged that *John Boys* had left a will which was in the following words:—"*London*, No. 11, *Gower Street* North, 28th *June* 1835. To my friends and relations who may be curious to inquire, be it known that a few years back of my own free will, I gave to *Eliza Morgan* commonly called *Eliza Castillo*, all my furniture, table, and bed linen, and apparel, plate, watches, and trinkets of any kind then in my possession, a piano-forte, all my library,

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library, manuscripts, papers, &c., whatever have been added and may hereafter be added previous to my decease, without any exception whatever, to her sole use and disposal, under promise from her that she will take care that I shall never be in want of any articles as long as I live. Having attained to the eighty-second year of my existence, and finding the infirmities of age increasing, I choose to give her this voucher of the truth, that none may question or trouble her to make declaration of it. She knows that thirty years ago, I agreed with Dr. *Hector Campbell* that he should have my carcase for chemical and anatomical experiments to be by him performed upon it, if he could prevail on her to give it to him; doubting her compliance, I will trouble my head no more about it. The world may think this to be from a spirit of singularity or whim in me. Be that as it may, I have always had a mortal aversion to funeral pomp and expense; and, therefore, trust she will avoid it; and had rather be given away with the sum a funeral would cost, for the purpose of dissection and chemical experiments. I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire Mrs. *Eliza Morgan* to do, and keep the residue for her own use and pleasure. *John Boys.*"

The supplemental bill then stated that, in *November* 1835, a suit was instituted by *Eliza Morgan* in the Prerogative Court, for the purpose of establishing the validity of the before mentioned will: that, after various proceedings in that suit, judgment was finally pronounced in *March* 1838, declaring the instrument to be a valid will, revoking the letters of administration previously granted to the Plaintiff, and granting probate of the will to *Eliza Morgan*, as executrix according to the tenor. The bill then charged that *Eliza Morgan* was a stranger

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a stranger in blood to the testator: that the before-mentioned sums were transferred into her name by the testator without any consideration whatever, and that she continued to hold them as a trustee for the testator: that, at the date of the will, the testator had at his banker's more than sufficient to pay all the debts which he then owed. The bill prayed a declaration that the general residue of the testator's estate did not pass by the will, and that *Eliza Morgan* was a trustee of the aforesaid several sums of stock for the benefit of the Plaintiff and the rest of the testator's next of kin; and that those sums might be transferred into Court and secured, until distribution should be made among the parties beneficially interested.

The Defendants to both these bills were *Eliza Morgan* and the several persons who, together with the Plaintiff, were the next of kin of the testator.

On the 24th of *May* 1838, the Defendant *Morgan* put in a plea to the first bill, pleading the judgment of the Prerogative Court, and the grant of probate of the will to her; and she, on the same day, filed a demurrer to the second bill, for want of equity. The plea and demurrer came on to be heard together, when the Vice-Chancellor made two separate orders, allowing them both, without costs.

The Plaintiff presented a petition of appeal against both orders. The petition was presented in one of the causes only; and as the parties to the two were precisely the same, it did not clearly appear in which it was presented.

The *Solicitor-General* took a preliminary objection to the petition, on the ground that it included, as the subject

subject of appeal, two several orders made in distinct suits.

*The* Lord Chancellor considered the objection valid; but on the Appellant's counsel electing to treat the appeal as an appeal against the order on the demurrer only, and undertaking to amend his petition by restricting it accordingly, he allowed the argument to proceed.

Mr. *Wigram* and Mr. *Richards*, for the appeal.

The *Solicitor-General*, Mr. *Jacob*, and Mr. *J. Russell*, for the Defendant *Morgan*, in support of the demurrer.

The argument consisted principally of critical observations on the language and provisions of the will. The following cases were referred to; *Crooke* v. *De Vandes* (*a*), *Legge* v. *Asgill* (*b*), *Ommanney* v. *Butcher* (*c*), *Hastings* v. *Hane.* (*d*)

*The* Lord Chancellor.

The question turns upon the meaning which the testator attached to the term "residue" — whether he meant the residue of whatever balance there might be in his banker's hands, or whether he meant the residue of the property which he had to dispose of. Now, it is to be assumed as a fact, upon the present consideration, that he had transferred certain funded property into the name of the person to whom probate of this will has been granted,

(*a*) 9 *Ves.* 197.
(*b*) 1 *T. & Russ.* 265. *n.*
(*c*) 1 *T. & Russ.* 260.
(*d*) 6 *Sim.* 67.; and see *Kendall* v. *Kendall*, 4 *Russ.* 360.; *Leighton* v. *Bailie*, 3 *Mylne & Keen*, 267.; and *Dowson* v. *Gaskoin*, 2 *Keen*, 14.

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granted, and to whom the residue, whatever it may be, is given. On the face of his will he desires that his friends and relations, that is, those persons who are interested in his estate, may be apprised that he had given furniture, and a variety of other articles which he enumerates, to the same person. It is quite clear he considered that he had divested himself of the whole of his property, and that this person was the depositary of that property: for when he states that he had done so under a promise from her that she would take care he should never be in want of any thing as long as he lived, it is impossible not to suppose that he conceived her to be the donee of the property, without the use of which he would not be able to continue enjoying the comforts of life, and that he had done so in consequence of her promise that he should not want for anything as long as he lived.

In considering what he meant by the word "residue," it is extremely important to see what, on the face of his will, he shews to have been his view of the interest which this person was to take in his property. He supposed she had got the whole or nearly the whole of it. He had actually transferred to her his funded property; or at least a great portion of it, for it is not alleged to have been the whole. He states that he had made over to her a variety of other articles; and accompanies that statement with the expression I have already referred to.

The next passage, which is at all material, is that in which, after disposing of his body for the purpose of dissection, the testator speaks of his funeral. He says he has a great aversion to funeral expense, and therefore trusts she will avoid it. How is she to avoid it? What had she to do with it? If he had named her executrix,

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executrix, no doubt, as incident to the office, whatever might be the ultimate disposition of the property, he might consider her as having the disposal of it, as far as the funeral expenses were concerned; but there is no nomination of an executrix in terms. She obtains the appointment of executrix, not because he has in terms nominated her, but because she is considered by the Ecclesiastical Court as having been so treated, with reference to the property to be administered, as to come within the rule of that Court by which it grants probate to a person as executor, though not named as such. It is quite clear she was to have the control of what would be the amount of the funeral expenses. Thus far, no property had been given to her over which she could have any control for funeral expenses. Of course it is not to be supposed that, after having made her a present of the stock by transferring it to her—after having also given her all his other articles of property, on condition that she should not let him want for any thing as long as he lived,—he could have meant that his funeral expenses should be defrayed out of those funds. It is quite clear he considered that *Eliza Morgan* would, after his death, be in possession and have the discretion over, and the control and administration of, the funds out of which the funeral expenses were to be defrayed.

It is also to be observed, with regard to the funeral expenses, that the testator, not merely limits the amount of money to be spent, but seems rather to have had a more extensive object in view. His words are, "I had rather be given away with the sum a funeral would cost;" — not directing it to be done, but expressing a preference that the money, which would be otherwise expended on a funeral, should be given away, and not spent in that manner.

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Then comes the last and most material clause: — "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire Mrs. *Eliza Morgan* to do, and keep the residue for her own use and pleasure." The Appellant's argument is that the operation of this clause must be confined to such balance only as might be in the banker's hands. But what is it that he has desired to be done, for there can be no ambiguity about that? It is not contended that the direction to pay the debts is to be confined to the sum in the banker's hands: that might or might not be enough — it is a mere guess; and although it may be said that this particular direction is unnecessary, inasmuch as the law would itself give effect to the purpose, still it is material as throwing light on the testator's meaning. Undoubtedly he expresses a desire that his debts shall be paid at all events; — be paid by whom? By the individual whom, from the beginning of the will to the end, he has considered to be the person who had the control over his property, part of which he had given her in his lifetime, and who, as he conceived, would have the control over the whole of it at his death. Immediately after the passage as to discharging his debts comes the clause desiring that she shall keep the residue for her own use and pleasure. There is undoubtedly no expression showing that he contemplated a surplus beyond what would be required to satisfy the debts: it is quite uncertain — a mere conjecture — "I guess there will be found sufficient in my banker's hands to defray and discharge my debts." But I cannot confine the operation of the last clause to the balance in the banker's hands, without at the same time confining the direction as to the payment of the debts to the same balance; and if I were to do so, I should be doing violence to the words, and supposing what it is quite absurd to suppose, viz. that he intended

to

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to direct that the debts should be paid out of the particular balance, which might or might not be sufficient for the purpose. The legatee could not control the payment of the debts, and the creditors would have a right to payment out of any property they could find, whether in the banker's hands or not. The question is, did the testator mean that the debts should be paid only in the event of there being a balance in the banker's hands sufficient for the purpose? No such intention is imputed to him: on the contrary, the intention imputed is that the person to whom he gives the residue of his property is to pay the debts out of that property; that is to say, out of the property claimed under his residuary gift: and what is found in the will relative to the balance at the banker's is merely an expression of his conjecture with respect to the amount of that portion of the residue.

It appears to me that the cases that have been referred to are not cases which exactly govern the present: the expressions are not precisely the same; but the principles on which Lord *Eldon* proceeded in *Crooke* v. *De Vandes*, and *Legge* v. *Asgill*, go the full length which is required in the present case.

I therefore dismiss the appeal, but without costs.

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*Nov.* 8. 15.
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*Nov.* 17.

## DRYDEN *v.* FROST.

If the same person is agent both for the vendor and purchaser, or is himself vendor and agent for the purchaser, whatever notice he may have will affect the purchaser; and a purchaser taking a conveyance from a vendor, who has not possession of the title-deeds, will take it with notice of any claim which the party in possion of the title-deeds may have.

THIS was the appeal of two of the Defendants, the personal representatives of *John Frost* deceased, against a decree of his Honor the Vice-Chancellor.

The *Solicitor-General* and Mr. *J. J. Jervis* for the appeal.

Mr. *Wigram* and Mr. *Duckworth* in support of the decree.

The material facts of the case, and the points raised by the appeal, are fully stated and considered in the judgment.

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*The* LORD CHANCELLOR.

The benefit of the vendor's lien for purchase money unpaid may be assigned by parol to a third party; *Semble.*

An equitable mortgagee is not entitled to have out of the estate his costs of an unsuccessful attempt to defend an action at law for recovery of the mortgaged premises.

The decree in this case gives to the Plaintiff the ordinary relief as an equitable mortgagee for the sum of 66*l.* 13*s.* 4*d.*, as to which there is no dispute: but the questions raised by the appeal are, whether the decree is right in also giving to the Plaintiff the benefit of a lien for another sum of 50*l.*, and in directing that the costs at law which the Plaintiff has been compelled to pay to the Defendants should be repaid by them personally to the Plaintiff; and in giving to the Plaintiff payment of his own costs at law out of the estate.

The facts, as admitted or proved, appear to be that *James Kelsey*, the original owner of the property, created several mortgages by demises for terms of years, prior to the mortgage claimed by the Plaintiff; and on the 16th

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16th of *May* 1821 demised part of the property to *Thomas Sharpe* for nineteen years, to secure 66*l.* 13*s.* 4*d.* and interest, which mortgage term has become vested in the Plaintiff by assignment of the executrix of this *Thomas Sharpe*, dated the 20th of *October* 1831.

On the 12th of *June* 1829, *Kelsey*, the owner of the inheritance, conveyed the property, subject to the mortgages, to one *Atkinson*, upon trust to sell; and on the 2d of *June* 1830, *Atkinson*, *Kelsey*, and all the mortgagees except the executrix of *Sharpe*, who, though named as a party, did not execute the deed, joined in conveying the inheritance and assigning the terms to one *Edward John Marr*. The consideration money, as stated in the deed, was sufficient to pay what was stated to be due to the several incumbrancers, including the mortgage to *Sharpe*, and 100*l.* more; which sum, therefore, was agreed to be paid to *Atkinson*, the trustee for sale.

The Plaintiff acted in this transaction as agent and attorney for *Atkinson*, the trustee for sale, and for the executrix of *Sharpe*, she not having at that time assigned the mortgage to him; and in one, or other, or both those characters, he had in his possession the title-deeds of the property mortgaged to *Sharpe*. It also appears that *Marr* was clerk to *Charles Frost*, an attorney; and the answer admits that this deed was prepared by *Marr*, and perused on his behalf by *Charles Frost*. It further appears that *Marr* subsequently borrowed 1340*l.* of *John Frost*, and by lease and release, of the 24th and 25th of *August* 1830, conveyed this property to him, by way of mortgage, to secure that sum. The answer of the Appellants admits that *Marr* prepared this deed also, as solicitor or agent for himself and the said *John Frost*, and that *Charles Frost* looked over the draft

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of it as a friend, after it was prepared. *Atkinson* was examined as a witness in the cause; and he states that the Plaintiff had a lien for costs on account of the sale of the property, and that it was agreed that he should receive the 100*l.* due from *Marr* as part of the purchase-money, and agreed to be paid to him (*Atkinson*) on account of such claim; that 50*l.* were accordingly paid by *Marr* to the Plaintiff, and a promissory note given for the other 50*l.*, which, not being paid, is the sum of 50*l.* in question.

Upon these facts the questions are, first, had the Plaintiff a lien for this 50*l.*? and, if he had, secondly, are the Defendants, as representing the mortgagee under *Marr*, affected by such lien; that is, had the mortgagee actual or constructive notice of it at the time when his mortgage-money was advanced?

That *Atkinson* had a lien for 50*l.*, being part of the purchase-money unpaid, cannot be disputed: and he states himself that he agreed that the Plaintiff should receive that sum from the purchaser *Marr*, and that *Marr* agreed to pay it to him; that is, he (*Marr*) gave the Plaintiff his promissory note for the amount; and this transaction took place whilst the title-deeds were in the Plaintiff's possession, which he would be clearly entitled to hold till the amount of *Sharpe*'s mortgage was paid, and which, after such payment, he would have been entitled to retain as against his client *Atkinson* until his bill was discharged; and *Atkinson*'s interest in these title-deeds would in that case have been to retain them till *Marr* had paid the whole of his purchase-money, that is, the remaining 50*l.*

Under these circumstances, could *Marr*, without paying the 50*l.* to the Plaintiff, have demanded these deeds from

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from him? I think clearly not, and that the Plaintiff had an equitable lien upon them for the 50*l.*; and, if so, I think it clear that the mortgagee was affected with notice of this lien. It is admitted that *Marr* acted as the attorney of *John Frost*, the mortgagee; and *Marr* of course knew that 50*l.* of the purchase-money remained unpaid, and that the Plaintiff was to receive that sum. Now *Marr* was vendor and attorney or agent for the purchaser, *John Frost*, as in *Sheldon* v. *Cox* (*a*), or concerned both for vendor and purchaser, as in *Le Neve* v. *Le Neve*. (*b*) Independently, however, of the knowledge of *Marr*, *John Frost* the mortgagee was in this case taking the title from a purchaser (*Marr*) who was not in possession of the title-deeds. They were in the possession of the Plaintiff, a circumstance which, according to the authority of *Hiern* v. *Mill* (*c*), was of itself sufficient notice of the title of the party in possession of them.

I think, therefore, that upon both these grounds, *John Frost*, and the Defendants, who represent his interest, cannot support the defence of his having been a purchaser without notice.

It was contended, on the part of the Appellants, that to give to the Plaintiff the benefit of the vendor's lien for purchase-money unpaid would be contrary to the Statute of Frauds; as he could only claim it by parol assignment from *Atkinson*, the vendor. It is to be observed, however, that the lien for the benefit of the vendor himself, as well as the lien by the possession of title-deeds, are not reconcilable with the principle of that statute, but that nevertheless equity gives effect to them; and that the Plaintiff's title rests upon the latter as well as upon the former;

(*a*) *Amb.* 624. (*b*) 3 *Atk.* 646. (*c*) 13 *Ves* 112

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former; for here we have the vendor and the purchaser, to one or other of whom the title-deeds must, after satisfying the mortgages, belong, concurring in an arrangement for the payment to the Plaintiff, being in possession of the title-deeds, of what remained unpaid of the purchase-money.

I am, for these reasons, of opinion that the decree of the Vice-Chancellor is right, so far as it gives to the Plaintiff the benefit of the lien to secure the *50l.*

The appeal, however, embraces another point; namely, that direction in the decree by which the Defendants are directed personally to repay to the Plaintiff the costs which he has been compelled to pay to them in the action of trover to be presently adverted to, and which gives to the Plaintiff payment out of the estate of his own costs at law.

The facts of this part of the case must be taken wholly from the bill, so far as they are admitted by the answer, there being no evidence applicable to it; and from them it appears that one *William Mortimer*—who, from the statement in the bill, "that the Plaintiff at the time, and for some time afterwards, believed him to be a tenant of part of the premises," must be assumed to be a stranger—called at the Plaintiff's office, and left a key of the premises; whereupon *John Frost*, in whom the legal estate was vested, brought an action of trover for the key, against the Plaintiff and *Mortimer*, which the Plaintiff took upon himself to defend; and a verdict, subject to a case, was found for *John Frost.* Afterwards, *Frost* having died, his executors had the case argued, and judgment was entered up for the plaintiff in the action; and the defendant, the Plaintiff in this suit, thereupon paid the costs and delivered up the key. The bill appears to have

have been filed after the argument of the case and judgment of the Court of law, but before execution thereupon; as it states the judgment and prays an injunction against the execution. But, from the statement in the answer, that injunction, if ever applied for, must have been refused, as the costs were paid, and the key delivered up.

The Vice-Chancellor's decree directs the Defendants personally to repay to the Plaintiff the costs at law which under the judgment he had paid to them, and that the Plaintiff should have his own costs at law raised and paid out of the mortgaged premises.

This Court, in settling the account between a mortgagor and mortgagee, will give to the latter all that his contract, or the legal or equitable consequences of it, entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at law or in equity. But even as to the costs in equity this Court exercises a discretion, and refuses to him his costs if his conduct has been improper; and, in some cases, orders him to pay them. In *Detillin* v. *Gale* (*a*) Lord *Eldon* says he ought to be indemnified to the extent that he acts reasonably as mortgagee; which must mean *reasonably* with respect to such rights as his mortgage title gives him; *England* v. *Codrington* (*b*), *Morony* v. *O'Dea* (*c*), ——— v. *Trecothick.* (*d*)

In this case the Plaintiff's title was in equity only; but, without applying to a Court of Equity, he assumes to himself the right of taking possession, and adversely retains the key, the symbol of possession, to the extent

(*a*) 7 *Ves.* 583.; see p. 585.
(*b*) 1 *Ed.* 169.
(*c*) 1 *Ba. & B.* 109.; see p. 121.
(*d*) 2 *V. & B.* 181.

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tent of defending the action of trover. In all this he was wrong, as the judgment at law proves. The costs he has incurred, and been compelled to pay in that useless and ill-advised contest, were not in furtherance of any rights to which he was entitled as mortgagee, but in asserting a supposed right which did not belong to him. Did he in so doing act *reasonably* as an equitable mortgagee? Were those costs necessarily or properly incurred in asserting or defending the right which his mortgage gave him? Certainly not. Those costs arose from a mistake as to his rights, from an attempt to obtain that to which he was not entitled, and cannot, therefore, be brought within any rule or principle under which a mortgagee is entitled to costs.

I am therefore of opinion that the costs of this unprofitable contest about the key must be borne as the judgment prescribes; and that there is no equity for relieving the Plaintiff from them at the expense of the Defendants, or of the estate.

I regret that there exists this ground for the appeal, as I should have been much better satisfied if I had found myself justified in dismissing it with costs, and thereby indemnifying the mortgagee; but, as the case stands, the decree must be varied by striking out so much of it as relates to the costs of the action of trover; and there can be no costs of the appeal.

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## TAYLOR *v.* BAILEY.

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*Nov.* 25.
1838.
*Nov.* 15.

When a Defendant puts in an answer to part of a bill and a demurrer to the rest, and the demurrer is over-ruled, and the Plaintiff then amends his bill, either by adding parties, or generally, the Plaintiff's right to except to the answer for insufficiency will not be waived by such amendment.

THE original bill was filed in *June* 1834, and, in the following *December*, before the answers were put in, was amended. In *January* 1835 *James Hurtle Fisher*, one of the Defendants, put in an answer to part, and a demurrer to the rest of the amended bill. The demurrer assigned, on the record, want of equity, as cause, which was held insufficient by the then Master of the Rolls; but the Defendant having then, *ore tenus*, assigned want of parties, as a cause of demurrer, the demurrer was, on that ground, considered valid, and an order was made allowing it, and at the same time giving the Plaintiff leave to amend by adding parties. (*a*) The

(*a*) The terms of this order were as follows; —

16th of *April* 1835.

"The matter of the demurrer put in by the Defendant, *James Hurtle Fisher*, to the Plaintiff's bill coming on &c., his Honor did order that the said demurrer should stand for judgment; and the said demurrer standing on the 20th of *March* 1835, for judgment, &c., his Honor held the said demurrer insufficient, and did therefore order that the same should be over-ruled, but without costs. And whereas the said Defendants did on the same day, by their counsel at the bar, demur to the Plaintiff's bill for want of parties thereto, and the said demurrer being argued, &c., his Honor did order that the said last mentioned demurrer should stand for judgment; and the said demurrer standing this present day, &c., his Honor held the said last-mentioned demurrer to be good and sufficient, and doth therefore order that the same do stand and be allowed; but his Honor doth not think fit to give any costs of this demurrer. And it is further ordered that the Plaintiff be at liberty to amend his bill as he may be advised; but such amendment is to be made within three weeks from this time." — Reg. Lib. B. 1834. f. 541.

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The cause of demurrer assigned *ore tenus*, namely, want of parties, was founded on the absence of the Plaintiff's father, *George Watson Taylor*, by whom, it was alleged, the Defendant *Fisher* might be otherwise called upon, in a new suit, to account over again in respect of the matters in question in the cause. The Plaintiff accordingly, on the 6th of *May* 1835, amended his bill by adding *George Watson Taylor* as a defendant, which was the only amendment then made; and on the 16th of the same month he delivered a number of exceptions to the answer put in in *January* 1835 to the amended bill; those exceptions being applicable as well to that part of the amended bill which had been covered by the demurrer as to the rest of it.

A motion having been made, before the Master of the Rolls, that the exceptions might be taken off the file for irregularity, that motion was refused with costs. The Master, afterwards, under the usual reference, made a report, allowing certain of the exceptions, all of them applying exclusively to those parts of the bill to which the demurrer had been put in; and the Vice-Chancellor, upon exceptions to this report, made an order over-ruling the decision of the Master.

The Plaintiff now appealed against his Honor's order.

Mr. *Wigram* and Mr. *Richards*, in support of the appeal.

The effect of the order made at the Rolls was that the Plaintiff was entitled to have a full answer to his bill, but not until he had brought *George Watson Taylor*, as a party, before the Court. The order of the Vice-Chancellor

Chancellor proceeded on the ground that the Master was wrong in holding that the Defendant was bound to answer the exceptions in question, inasmuch as they related to that part of the bill which had been covered by the demurrer; and his Honor was of opinion that the Plaintiff, by amending his bill before taking exceptions, had precluded himself from calling for an answer to those parts of the bill covered by the demurrer. In truth, however, the demurrer which applied to part only of the bill was over-ruled, and the demurrer which was allowed, being for want of parties, went to the whole bill, and the Plaintiff has since cured the objection grounded upon that defect. The over-ruling of the demurrer on the record, which was specifically confined to a portion of the bill, was tantamount to a declaration of the Court that that portion of the bill was not answered at all; and as to so much of the bill, therefore, no amendment, it would seem, could be reasonably construed as a waiver of the right to except for the insufficiency of the answer. At all events, it is settled that an amendment, by adding parties merely, shall not operate as such a waiver; *Taylor* v. *Wrench* (*a*), *Miller* v. *Wheatley.* (*b*)

Mr. *Wakefield* and Mr. *Bethell, contrà.*

The exact point now raised is new; but principle and analogy are in favour of the Vice-Chancellor's decision. It has long been a settled rule that a Plaintiff, by amending after answer, waives his right to except. In order to save the right there must be a special order; *Jacob* v. *Hall* (*c*), *De la Torre* v. *Bernales.* (*d*) When the demurrer for want of parties was allowed, and leave to amend given, the Plaintiff ought not to have acted upon

(*a*) 9 *Ves.* 315.
(*b*) 1 *Sim.* 296.
(*c*) 12 *Ves.* 458.
(*d*) 4 *Mad.* 396.

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upon the order until he had obtained a full answer to the bill already on the file. He should have taken exceptions to the answer already filed, and, after these were disposed of, have proceeded to amend his bill. The distinction here is that the Defendant has submitted to answer a part only of the bill; and within the scope of that part the Plaintiff has liberty to require a full answer (and that the Defendant has given a full answer to so much of it appears from the fact that all the exceptions to the answer have been disallowed): but as to the other part, that, namely, in which he has resorted to a different species of defence, by demurrer, he has not submitted to make any answer; and it is contrary to principle to permit the Plaintiff to take exceptions as to that part. The allowing of the demurrer, indeed, expressly absolved the Defendant from the obligation to answer so much of the bill as the demurrer purported to cover; *Sellon* v. *Lewen.* (*a*)

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1838. *Nov.* 15.

*The* LORD CHANCELLOR.

This was an appeal from an order of the Vice-Chancellor allowing exceptions to a report which had allowed exceptions

(*a*) 3 *P. Wms.* 239. It is presumed, from his Lordship's silence on this point in the principal case, that his Lordship considered that the allowance of a demurrer *ore tenus* for want of parties, put in when part of the bill has been already answered, is not to be treated as a judgment of the Court that the Defendant was not bound to answer that part of the bill (as it stood) which was not already answered. Whether it might not have been urged, upon the argument of the demurrer *ore tenus*, that that demurrer must be taken to be a demurrer to the whole bill, and therefore that it was over-ruled by the answer, *quære.* Upon the question whether a demurrer for want of parties can be put in to part of a bill, see *Red. Pl.* p. 180 n. 4th ed. and cases there cited.

exceptions to an answer, and the point raised does not appear to have been specifically decided in any reported case.

The original bill having been filed, and an answer put in, the bill was amended in *December* 1834. In *January* 1835, the Defendant, *James H. Fisher*, put in an answer to part of the amended bill, and a demurrer to the rest of it. In *April* 1835 the demurrer was over-ruled, and the Plaintiff obtained an order to amend his bill, under which he amended it, by adding parties only, on the 6th of *May* 1835; and, on the 16th of the same month, he filed exceptions to the answer so put in with the demurrer, which applied to that part of the amended bill to which the demurrer had been put in, as well as to the other part. In *June* the Master allowed some of the exceptions, all of which applied to that part of the bill to which the demurrer had been put in.

The Vice-Chancellor, having allowed exceptions to the Master's report, has in effect decided that, under the circumstances, the Plaintiff is not entitled to an answer to such part of the bill to which the demurrer applied; and the ground of that opinion is, that the Plaintiff, after the answer and demurrer had been put in, that is, on the 6th of *May*, amended his bill by adding parties.

Although there is no case directly in point, there are certain well known rules of practice which appear to me to lead to the proper decision of this point.

If a Plaintiff, before answer, amend his bill, the Defendant must answer the whole bill as amended. If a Defendant demur to the whole bill, and the demurrer be over-ruled, and the Plaintiff then amend the bill,

or

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or if, before argument of the demurrer, the Plaintiff amend his bill, and the demurrer is so disposed of, the Defendant must answer the whole bill. The reason is obvious: in all these cases, there having been no prior answer, there can be no admission, on the part of the Plaintiff, of the sufficiency of any former answer, and no question as to what part of the bill the Defendant ought to answer. But if, after an answer put in, the Plaintiff amend his bill, otherwise than by adding parties, he cannot afterwards except to the answer. He is considered as having, by the amendment, admitted the sufficiency of the answer; and it is his own fault that he did not take exceptions to it before he amended his bill. Upon the same principle, if he takes exceptions to the answer, and they are submitted to or allowed, and he then amend his bill, he cannot take any new exception to that part of the bill which has not been amended, unless the amendments alter the meaning and construction of such part, and so in effect make it part of the amendment; *Partridge* v. *Haycraft*. (*a*) In the first case, by amending without excepting, he admits the sufficiency of the answer altogether; in the latter, by excepting, and then amending, he admits the sufficiency of the answer, except so far as he has complained of it by his exceptions; but how can he be supposed to admit the sufficiency of an answer, which the Defendant has, by demurring, refused to put in? and why is not a demurrer to part of the bill upon this point to be dealt with upon the same principle as a demurrer to the whole bill? It is the duty of the Defendant to keep separate the parts of the bill to which he answers from that part to which he demurs.

In the absence, therefore, of any authority, I cannot think that, upon principle, after a demurrer over-ruled, a plaintiff

(*a*) 11 *Ves.* 570.

a plaintiff ought to be precluded from calling for an answer to those parts of the bill covered by the demurrer, by his having amended the bill before taking exceptions.

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There is, however, another ground in the case which seems to exclude this general question; namely, that the amendment was only by adding a party, which, according to the cases of *Taylor* v. *Wrench* (*a*) and *Miller* v. *Wheatley* (*b*), would not, in any case, preclude the Plaintiff from taking exceptions to the answer. There is no question but that the parts excepted to are not answered; and I am of opinion that the Defendant is compellable to answer them, and, consequently, that the exceptions to the Master's report ought to have been over-ruled.

(*a*) 9 *Ves.* 315. (*b*) 1 *Sim.* 296.

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## BUDGEN *v.* SAGE. (*a*)

## RAWDON *v.* SAGE.

*March* 10. 16.

*ISAAC SAGE* by his bond, dated the 15th of *June* 1812, bound himself in the penal sum of 1200*l.* conditioned for the payment to *Richard Jennings* of 632*l.*

A residuary legatee filed a bill against the personal representatives of a testator, for an account and payment. Before decree in that cause, a creditor of the testator, upon a bond, in respect of which no interest had been paid, or acknowledgment of debt made for upwards of twenty years, filed a creditor's bill against the same representatives; and the Defendants, by their answer to the second bill, admitted the existence of the bond debt. Afterwards, the Plaintiff in the first cause obtained the common decree in a residuary legatee's suit, and the Defendants thereupon moved for and obtained an order that all further proceedings in the second cause might be stayed. The Lord Chancellor, on appeal, discharged that order, and in the second cause made the common decree in a creditor's suit, and directed the report to be made in both causes.

(*a*) The reporters are indebted to Mr. *Calvert* for the note of this case.

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632*l.* 15*s.*, with interest. *Isaac Sage* died in 1815, having left his residuary personal estate to his daughter.

*Budgen*, the Plaintiff in the first mentioned suit, married the daughter, and in 1835 filed his bill against the personal representatives of *Isaac Sage*, for the purpose of obtaining an account and payment of the residuary personal estate of *Isaac Sage*; and, on the 26th of *July* 1837, the common decree in a residuary legatee's suit was made in the cause of *Budgen* v. *Sage*.

On the 3d of *May* 1837, *Rawdon*, the Plaintiff in second mentioned suit, and who was then entitled to the benefit of *Isaac Sage*'s bond, filed a creditor's bill against the personal representatives of *Isaac Sage*. At the time of filing the bill the principal debt and interest exceeded the penalty, no interest having been paid in respect of the bond since the death of *Isaac Sage* (the obligor) in 1815. No acknowledgment of the bond debt had been made since the death of the obligor. The Defendants, in *Rawdon* v. *Sage*, by their answer, admitted the existence of the bond debt. On the 8th of *August* 1837, the cause of *Rawdon* v. *Sage* was set down for hearing. On the same day, the Plaintiff's solicitor in *Budgen* v. *Sage* gave the Plaintiff's solicitor in *Rawdon* v. *Sage* a formal notice of the common decree in a residuary legatee's suit having been obtained in *Budgen* v. *Sage*, and submitted that *Rawdon* would have an opportunity of establishing his claim under that decree, and that all further proceedings in *Rawdon* v. *Sage* would be irregular. On the 11th of *November* 1837, the Plaintiff's solicitor in *Rawdon* v. *Sage* sent the following notice to the Plaintiff's solicitor in *Budgen* v. *Sage*, and to the Defendants' solicitor in both suits;—"I beg to inform you that I intend to proceed with the cause of *Rawdon* v. *Sage*, unless you take steps, before the 18th of *November* instant, to obtain

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an order staying proceedings and providing for the costs of the Plaintiff in *Rawdon* v. *Sage*, and placing him in the same situation with respect to the proof of his debt as he would be in if *Rawdon* v. *Sage* were prosecuted."

On the 2d of *December* 1837 a motion was made in both suits, before the Master of the Rolls, by the Defendants (being the same persons in both suits, *i. e.* the personal representatives), to restrain the Plaintiff in *Rawdon* v. *Sage* from all further proceedings in that suit. The motion was opposed, on the ground that *Rawdon* v. *Sage* was ready for hearing, and that the Plaintiff in that suit could not have the same benefit under the decree in *Budgen* v. *Sage* as he would have in his own suit. Mr. *Booth* appeared for the Defendants in both suits; Mr. *Bacon*, for the Plaintiff in *Budgen* v. *Sage;* and Mr. *Havens*, for the Plaintiff in *Rawdon* v. *Sage*. The Master of the Rolls ordered the motion to stand over till the hearing of the cause of *Rawdon* v. *Sage*.

On the 23d of *December* 1837, *Rawdon* v. *Sage* came on for hearing at the Rolls; and Mr. *Booth* again moved in both suits to stay all proceedings in *Rawdon* v. *Sage*. Mr. *Havens* read the admissions in the answer of the Defendants in *Rawdon* v. *Sage* with respect to the bond debt, and contended that the Plaintiff in that suit was entitled to the usual decree in a creditor's suit.

The Master of the Rolls made an order directing that proceedings in *Rawdon* v. *Sage* should be stayed; that the Plaintiff in that suit should be at liberty to go in, under the decree in *Budgen* v. *Sage*, and prove his debt, and also his costs up to and including the motion to stay him; and that he should pay the costs of the hearing in *Rawdon* v. *Sage*.

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*March* 10.

Mr. *Havens*, on behalf of the Plaintiff in *Rawdon* v. *Sage*, moved, before the Lord Chancellor, to discharge or vary the order of the Master of the Rolls, and contended that his client could not, in *Budgen* v. *Sage*, have the benefit of the admissions which, by the answer in *Rawdon* v. *Sage*, the Defendants had made of the existence of the debt; that, at the time when his suit was stayed, *Rawdon* was in a situation to take a decree; and that it was extremely hard upon him to deprive him of that advantage, and to compel him to prove his debt in *Budgen* v. *Sage*, where the question of presumed satisfaction of the bond might be successfully raised against him, and where he would not have the costs of proving his debt.

Mr. *Bacon*, in opposition to the motion, said the matter had been fully gone into before the Master of the Rolls, when the cause came on before him; and that the Master of the Rolls held that, according to the practice, the Plaintiff in *Rawdon* v. *Sage* was not entitled to a decree in that suit. He also referred to and distinguished the cases of *Shepherd* v. *Towgood* (*a*), and *Pickford* v. *Hunter*. (*b*)

Mr. *Booth*, also in opposition to the motion, said that the Plaintiff in *Rawdon* v. *Sage* had actually invited the Defendants to stay the suit.

*The* LORD CHANCELLOR.

But, Mr. *Booth*, you have not, in compliance with the terms of the notice, placed the Plaintiff in *Rawdon* v. *Sage* in the same situation as that in which he would be in case his own suit were prosecuted. Before I decide on

(*a*) 1 *T. & Russ.* 379. (*b*) 5 *Sim.* 122.

on this motion, I should like to be placed in the same situation as the Master of the Rolls was, by having the cause of *Rawdon* v. *Sage* set down before me; and let the motion stand over till then.

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*March* 16. *Rawdon* v. *Sage* was accordingly set down by consent, and came on for hearing before the Lord Chancellor, when Mr. *Havens* read the admissions in the answer of the Defendants.

*The* LORD CHANCELLOR asked the Defendants' counsel, Mr. *Booth*, whether he had any reason to give, why the Plaintiff in *Rawdon* v. *Sage* was not upon these admissions entitled to a decree?

Mr. *Booth* admitted that he had none.

*The* LORD CHANCELLOR then asked the counsel for *Rawdon* whether he submitted to go in under *Budgen* v. *Sage*, provided he got his decree in *Rawdon* v. *Sage*; and was answered in the affirmative.

*The* LORD CHANCELLOR.

Then take the usual creditor's decree in the suit of *Rawdon* v. *Sage*, and let the Master make one report in both suits. The order of the Master of the Rolls will be discharged; and let the costs of the motion below and of this motion be costs in the cause of *Budgen* v. *Sage*.

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*July* 2.
*Nov.* 12.

## BARBER *v.* BARBER.

A testator, after bequeathing certain shares of his residuary estate (the produce of a mixed fund) to his son and daughter respectively, directed that the interest of the share given to the son should be applied for his maintenance and education till twenty-one, and that after that period he should have power to receive and dispose of such interest till his age of twenty-five, when the whole of the property bequeathed to him was to be at his own disposal. He further directed that half the property given to his daughter should be invested, in trust for her maintenance, education, use, and benefit, during her life, and for her children, if any, after her decease; and, if there was no issue living at her decease, the said property was to devolve to his son; and in case he was dead also, and had left no issue, the said property was to devolve to his executors thereinafter named. The other half of the property bequeathed to his daughter he directed to be invested for her sole use and benefit till twenty-one, and that the said property should then be at her own disposal; and, if either the son or daughter should die under twenty-one, the property bequeathed to the one so dying should devolve to the other; and, if both should die under that age, then the property bequeathed to them should devolve to and become the property of the four persons therein named and described, to be divided betwixt them in equal proportions, and their heirs for ever; which four persons he also appointed his executors. One of the four persons named executors renounced probate, and declined to act; and afterwards both the son and daughter died under twenty-one, and without issue:

Held, first, that the interest which accrued upon the shares of the son and daughter during their respective minorities, so far as it had not been applied to their maintenance and education, vested absolutely in them, and passed to their personal representatives; and,

Secondly, that the one fourth share in the residue, to which the executor who had renounced would have been entitled as one of the legatees over, if he had acted, was a lapsed legacy, and did not devolve to the three other persons named with him as legatees of that residue.

*JOHN MACKINTOSH*, by his will, which was duly executed and attested to pass freehold estate by devise, after directing that his real and personal estate and effects should be sold, and his debts paid, and that an investment should be made to answer a certain annuity therein mentioned, and giving the capital of the fund so to be invested, after the death of the annuitant, to his son *John* and his daughter *Eliza Jane*, gave and bequeathed unto his son *John Mackintosh*, his daughter *Eliza Jane Mackintosh*, *Mary Ann Shears*, and *Martha Shears*, the whole residue of his property of every description, to be divided among them in separate and equal proportions. And, after giving special directions with respect to the investment and application of the respective shares of *Mary Ann Shears* and *Martha Shears*, his will continued as follows: —

"After

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"After the sale of my estate and property as before directed, I desire that the property I have bequeathed to my son *John Mackintosh* and my daughter *Eliza Jane Mackintosh* may be invested in the public funds of *Great Britain*, in separate accounts, in the names of trustees appointed by my executors, and also in the names of my son and daughter, and for the sole use and benefit of my son and daughter. And it is also my will and desire that the interest or dividends, arising from the said funded property for my son *John*, be applied for his maintenance, education, &c., until he arrives at the age of twenty-one years; and after that period he shall have the power of receiving such interest or dividends himself, and dispose of it as he may think proper, until he arrives at the age of twenty-five years: then the whole of the property I have bequeathed to him shall be at his own disposal without control.

"It is my will and desire that half the property which I last bequeathed to my daughter *Eliza Jane* may be invested in the public funds of *Great Britain*, in the name of herself and trustees appointed by my executors for that purpose, for her maintenance, education, use, and benefit during her life; and for her child or children, if any, living at the time of her decease. But if there is no issue living at the time of her decease, that the said property shall devolve to my son *John Mackintosh;* and in case he is dead also, and has left no issue, the said property shall devolve to my executors herein named: but if there is issue of my son *John* living, then it shall devolve to that issue. And the other half of the property bequeathed to her shall be invested in the public funds for her sole use and benefit until she arrives at the age of twenty-one years; then the said property shall be at her own disposal without control.

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"It is my will and intention that my son *John Mackintosh* may dispose of his property by will after he has attained the age of twenty-one years; but should he die before he arrives at that age, then the said property shall devolve to my daughter *Eliza Jane*, if she is living; and should *Eliza Jane* die before she is twenty-one years of age, then the property bequeathed to her shall devolve to my son *John;* but should both die before they arrive at twenty-one years of age, then the property bequeathed to them shall devolve to and become the property of Mr. *Joseph Barber*, *America Square*, Mr. *John Stapp*, of *Snowhill*, Mr. *Frederick Grigg*, of the *Old South Sea House*, and Mr. *George Capper*, of *Crosby Square*, in *London*, to be divided betwixt them in equal proportions, and to their heirs for ever; which last mentioned four persons I also appoint as my executors, to see that every thing is duly executed and performed according to my will and desire herein. I also appoint Mr. *Francis Garratt* and Mr. *John Garratt* as executors, in addition to the above persons; for which I request these two friends will accept of 50*l.* each, as a testimony of my regard. I also request that Messrs. *Francis* and *John Garratt* will act as guardians in conjunction with Mr. *Capper*, Mr. *Barber*, Mr. *Grigg*, and Mr. *Stapp*, for the care of the persons and property of my son *John*, and *Eliza Jane*, and *Mary Ann*, and *Martha Shears*."

The testator, by an unattested codicil, stated his will to be, that if any of his executors should refuse to accept the trust and act as executor according to the directions in his will, then he annulled totally his bequest of his property to every such person who should so refuse.

The testator died in the year 1818, leaving his son and daughter, *John Mackintosh* and *Eliza Jane Mackintosh*,

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*tosh*, his sole next of kin; and a bill was soon afterwards filed to have the rights of the different parties interested under the will ascertained, and the property administered and secured for their benefit, under the direction of the Court. *George Capper*, *Francis Garratt*, and *John Garratt* renounced probate of the will, which was proved by the three other persons named as executors, who alone acted in the execution of the trusts.

*John Mackintosh*, the son, died in *November* 1834, an infant of the age of nineteen years, and without issue; having, by his will, bequeathed all his personal estate to *Eliza Jane Mackintosh*, his sister, and appointed the said *Joseph Barber* his sole executor. *Eliza Jane Mackintosh* died a few months afterwards, also under age and unmarried, and leaving a will: and upon her death a bill of revivor and supplement was filed by her personal representatives against the six persons named as executors in the will of the original testator, and against the other persons interested in his residuary estate, praying that the rights of the Plaintiffs, as representing *Eliza Jane Mackintosh*, might be declared.

The decree of the Master of the Rolls, made at the hearing of this supplemental cause, contained, amongst other things, the two following declarations:—first, that so much of the income of the several shares of *John Mackintosh* and *Eliza Jane Mackintosh*, in the residue of the original testator's estate, as accrued during their respective lifetimes, and was not applied in their maintenance or education, belonged absolutely to them, respectively, and passed by their respective wills; and, secondly, that the share which *George Capper* would, under the original testator's will, have taken in the two several moieties of the one fourth share of the residuary estate thereby bequeathed to *Eliza Jane Mackintosh*, and to her

and

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and her children, and also in the one fourth share of such residuary estate, thereby bequeathed to *John Mackintosh*, had, in consequence of *Capper* having renounced probate, devolved upon the Defendants *Barber*, *Stapp*, and *Grigg*, as tenants in common; and that those three persons were entitled, in equal thirds, to the said two one fourth shares accordingly.

The Plaintiffs and the Defendants, the acting executors of the original testator, presented cross-petitions of appeal against the decree of the Master of the Rolls, which came on to be heard together.

The Plaintiffs, by their appeal, submitted that the contingent bequest over of the shares of residuary estate, previously bequeathed to the testator's son and daughter, was not a gift to the persons, as a class, who should take upon themselves the office of executors, but was a gift to the four individuals named, as tenants in common; and that the one fourth, therefore, of that residue, which *Capper* had lost in consequence of his declining to act, was a lapsed legacy, and went to the testator's next of kin.

The Defendants' petition of appeal submitted that, upon the true construction of the will, such portion of the income as had accumulated upon the respective shares of residue, bequeathed to the testator's son and daughter respectively during their minorities, did not vest in the son and daughter absolutely, so as to form part of their estate, and pass to their respective personal representatives; but that in the event, which had happened, of their both dying under age, it had passed, under the ulterior limitation, to the persons who, upon that event, were appointed to take in remainder the shares of capital out of which such accumulation of income had arisen.

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The petitions of appeal also raised two other questions; but as these turned merely upon the construction of particular clauses and expressions in the will, and involved no general principle, it has not been considered expedient to report the case as to them, or to set out those parts of the will upon which they arose.

Mr. *Wigram*, Mr. *Humphry*, Mr. *Elderton*, and Mr. *Loftus Wigram*, for the Plaintiffs.

Mr. *Tinney*, Mr. *Knight Bruce*, Mr. *Richards*, and Mr. *Romilly*, for the Defendants, the executors.

The cases referred to upon the question raised by the Plaintiffs' appeal are stated and considered in the judgment.

Upon the question raised by the Defendants' appeal, *Nicholls* v. *Osborn* (*a*), *Chaworth* v. *Hooper* (*b*), *Skey* v. *Barnes* (*c*) were cited.

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*Nov.* 12.

*The* LORD CHANCELLOR. [After affirming the judgment of the Master of the Rolls upon another question, raised by the Defendants' appeal.]

The remaining question upon the appeal of the Defendants is, as to the interest upon the shares of the residue bequeathed to *John* and *Eliza Jane*, they having both died under twenty-one, and thereby lost the benefit of the capital of such shares.

The gift is to the four residuary legatees absolutely, subject to the following directions: — The investment is

(*a*) 2 *P. Wms.* 419. (*b*) 2 *Bro. C. C.* 82. (*c*) 3 *Mer.* 335.

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is to be for the sole use and benefit of *John* and *Eliza Jane*. The interest and dividends of *John*'s share are to be applied for his maintenance and education till twenty-one: from that age till twenty-five he is himself to receive and to have power to dispose of such interest and dividends; and at twenty-five the whole property is to be at his disposal. Half the property last bequeathed to *Eliza Jane* is to be invested for her maintenance, education, use, and benefit, for her life, with remainder to her children; and if there should be none, the said property is to devolve to *John*: and if he should also die without issue, the said property is to devolve to the executors. The other half of the property bequeathed to *Eliza Jane* is to be invested for her sole use and benefit till twenty-one, when the same is to be at her sole disposal. If both *John* and *Eliza Jane* die before twenty-one, the property bequeathed to them is to devolve and become the property of the four executors.

The gifts are absolute, except in the event of death under twenty-one; and the interest of *Eliza Jane*'s share is, in the mean time, to be applied for her use and benefit as to one half, and her sole use and benefit as to the other half. The interest and dividends of *John*'s share are directed to be applied for his maintenance, education, &c. till he attains twenty-one. As to both, the investments are to be for the sole use and benefit of the legatee; and the gift over is of "the property bequeathed," the expression throughout used in describing the capital.

As to the whole of *John*'s share, and as to one half of *Eliza Jane*'s share, the gift is absolute; but the power of disposition is postponed till a certain age; and of the other one half of *Eliza Jane*'s share she is tenant for life; and as to all, there is a gift over, upon the happening of

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of certain events; but till such events happen, the property belongs to the legatees *John* and *Eliza Jane*, and they are entitled to the interest of it. It is vested, subject to be devested. The ordinary result of such vesting is to give to the legatee a right to the intermediate interest; and he cannot be less entitled to it because the testator has directed the interest to be applied for his maintenance, education, &c., for his use and benefit, or for his sole use and benefit. And who is it who contest this claim of the legatees? Why, the legatees over. Do the terms of the gift over give it? The terms used are "the property bequeathed" to the first legatee—the very terms used in describing the capital, and terms by no means applicable to the interest upon the property bequeathed, which might arise after the bequest had taken effect. If they cannot claim under the terms of the gift over, that is, if the interest accrued be not, in terms, given over with the capital, they, as legatees of that capital upon a contingency, can have no title to the interest which arose prior to the contingency. I think, therefore, the judgment of the Master of the Rolls entirely right upon this point also; and, as this exhausts the grounds of the appeal of the Defendants, I think that such appeal must be dismissed with costs.

[The LORD CHANCELLOR then stated the two questions which had been raised on the appeal of the Plaintiffs, and after disposing of the first, as to which he concurred in the judgment of the Master of the Rolls, continued as follows: —]

The last question is one of much more difficulty. The Plaintiffs claim the share of *George Capper* as undisposed of, the gift to him having failed by his refusing to act as executor. The three other executors named with him as residuary legatees, on the other hand, contend

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tend that they are entitled to the residue in thirds, including, therefore, the share destined for *George Capper*. The direction in the will is that, in the event of the death of *John* and *Eliza Jane* under twenty-one, the property bequeathed to them shall devolve to, and become the property of the four persons, each particularly named and described, to be divided betwixt them in equal proportions, and to their heirs for ever; which last mentioned four persons he appoints executors; and he afterwards appoints two other executors. It is not now in dispute that this bequest was made to these four persons *as executors;* that is, upon condition that they took upon themselves that office, and consequently that Mr. *Capper*, having renounced, cannot claim his share; but that being so does not appear to me to assist in the solution of the present question. That would have been so, just as much if *Capper* had been the only executor, and the only legatee over. That question depends entirely upon whether the gift be conditional or not.

The question to be decided is, who are the legatees? It is quite clear that, if the legatees had not been appointed executors, the gift to them would have created a tenancy in common, and therefore that, upon the failure of the gift to any one, his share would have been undisposed of, and that the three others could not have claimed. And it is equally clear that, if any other condition had been imposed upon these four tenants in common, upon which their title to the legacy was to depend, and one had refused to perform the condition, his share would have been undisposed of, and that the other three could not have claimed it. The ground upon which the title of the executors who proved is rested leaves these propositions untouched; for it stands upon this ground, that the

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the gift is to a class, and that the three executors who proved constitute the class; and it was contended that there was no distinction between a gift to executors as tenants in common, and a gift to certain persons as tenants in common who are afterwards appointed executors.

This, as all other questions of construction, must depend upon the intention. A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of *A.* at a particular time, those who constitute the class at the time will take; but if the legacy be given to *B.*, *C.*, and *D.*, children of *A.*, as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might, at the time, constitute the class, or to certain individuals who, it was supposed, would constitute it? Such would appear to be the question to be asked, and the point to be ascertained; but the more important inquiry is, whether the authorities justify and support this view of the case.

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In *Page* v. *Page* (*a*), decided by Lord *King* in 1728, and approved by Lord *Talbot* in 1734, there was the gift of a residue to six persons, to each one sixth; and they were appointed executors. It was held that the one sixth of one who died in the lifetime of the testator lapsed for the next of kin. In this case there is a gift to four equally, to be divided betwixt them, *i. e.* to each one fourth. In *Owen* v. *Owen* (*b*) the testator gave the residue of his estate to his two nieces, to be equally divided between them, and appointed them executrixes. One died in the testator's lifetime; and Lord *Hardwicke* said that he had followed *Page* v. *Page* in *Holderness* v. *Reyner*; and that the reasoning of Sir *J. Jekyll*, in *Hunt* v. *Berkley*, could not be supported; and held that the share intended for the deceased niece lapsed for the benefit of the next of kin, and did not go to the surviving niece.

In *Knight* v. *Gould* (*c*), the gift was of the residue "to my executors hereinafter named, to pay my debts, legacies, &c., and also to recompense them for their trouble, equally between them;" and three persons were then named executors, one of whom died in the testator's lifetime; and Sir *John Leach* first, and Lord *Brougham*, upon appeal, held, that the two survivors were entitled to the whole. The latter relied upon two grounds principally, first, that the persons to take were those who were to perform the duties, and the survivors were such persons; secondly, that the gift was to the executors as a class in terms; for the words "hereinafter named" were mere surplusage, inasmuch as the result would have been the same if they had been omitted, it being absolutely necessary to name them in order to appoint them. In that

(*a*) 2 *P. Wms.* 489.
(*b*) 1 *Atk.* 494.
(*c*) *Mos.* 47.
(*d*) 2 *Mylne & Keen*, 295.

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that case the gift was to executors described as such; in this, it is to individuals particularly named and described. In that, the fund given was what should remain after part had been administered. Those who were to take and those who were to administer were considered as identical.

The result, therefore, of the authorities, supposing them strictly to apply, is in favour of the claim of the next of kin. There is the case of *Page* v. *Page*, decided by Lord *King* and approved by Lord *Talbot*, and in two cases approved and acted upon by Lord *Hardwicke;* whereas, in support of the claim of the acting executors, there is only the case of *Hunt* v. *Berkley*, decided, indeed, by a high authority, Sir *Joseph Jekyll*, but disapproved by Lord *Hardwicke*, and over-ruled by every subsequent case in which the point has arisen. It is also to be observed that the case of *Hunt* v. *Berkley* would not, if it were clearly a right decision, necessarily govern the present case; because, in that case, the residuary legatees and the executors were the same, and the decision must have proceeded upon this, that the testator did, in fact, intend to give the residue to whomsoever of the parties named might be his executors. But it is clear that, if *Page* v. *Page*, *Holdcrness* v. *Reyner*, and *Owen* v. *Owen*, be right, they necessarily include the present case; the claims of the next of kin being much stronger in this case than in any of those; inasmuch as, in all those cases, those named residuary legatees and executors were the same; so that the question might arise, whether the intention was to give the residue to the individuals, or to the class which they composed; whereas, in the present case, the residuary legatees do not constitute any class to which a name can be given, without including the description of residuary legatees. If the three surviving executors to

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whom the share of the residue was given are entitled, they must be so entitled as constituting the class intended to be benefited; but what is the class which they so constitute? Not the executors; because there were two other executors named besides the persons intended to be so benefited; and although the two others also declined to prove, so that the three, in fact, are the only acting executors, yet the class of executors, as contemplated by the testator, consisted of six; and there was clearly no intention to give the benefit to such of the six as might act as executors, for that might have given the benefit to the two. This case, therefore, has nothing in common with *Knight* v. *Gould*, or any other case in which the gift has been construed to be in favour of such as might act as executors. If, then, the class intended to take be not such as might, at the time, be the executors, it must be such of the executors named as might, at the time, be also of the number of the residuary legatees named; but that is only another mode of describing the residuary legatees; and, if their situation as residuary legatees be considered, they are only tenants in common of the residue, between whom there can be no survivorship.

There seems also to be some confusion in terms in considering legatees as constituting, as such, a class for the purpose in question. They have no existence as a class, except under the description in the will. To such persons a testator may undoubtedly give a right of survivorship *inter se*, by expressly directing it, or by creating a joint tenancy. The first the testator in this case has not done, and the second he has, in terms, excluded, by creating a tenancy in common; and he could not have intended that those who proved should take the whole in the event of some not proving, and not in the event of their dying before him. To effectuate a gift to those of the class he has himself constituted,

tuted, who may be in a condition to take at a particular time, he must have used expressions from which that intention may be fairly deduced. Such an intention cannot be deduced from a gift to four persons by name, between whom the share of the residue is to be divided.

It was contended that, at all events, the three survivors of the four residuary legatees must be entitled to the half of *Eliza Jane*'s share, which is directed to devolve to "my executors herein named." But I think that direction clearly superseded, or, rather, qualified and explained, by the subsequent gift of all he had bequeathed to *John* and *Eliza Jane*, to the four executors. The words first used would, indeed, unless so qualified and explained, carry that half, not to the four, but to all the six executors.

The Master of the Rolls considered this question as attended with very considerable difficulty, a circumstance which relieves me from much of the embarrassment I always feel when I have the misfortune to differ in opinion from him; but, after taking all the means in my power to come to a right conclusion, I should not be doing justice to the parties if I did not declare that I have come to a conclusion, quite satisfactory to my own mind, that the three survivors of the four executors, named as residuary legatees of the part of the residue, cannot take the share destined by the will for Mr. *Capper;* but that he having given up his title to it, such share became undisposed of, and, as such, belongs to the Plaintiffs.

In this respect, therefore, I am of opinion that the decree of the Master of the Rolls must be varied, but affirmed upon all the other points. Of course there can be no costs of this appeal.

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There was also a question of costs raised by the Defendants' appeal, to which I omitted to advert. The decree directs the costs to be paid out of the share of the residue destined for *John* and *Eliza Jane*, as to which alone the question arose; and this I think was clearly the right direction.

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*June* 4, 5. 9.

## URCH *v.* WALKER.

A testator gave a legacy of 1100*l.* to two persons, upon certain trusts, for the benefit of his daughter and her children: he then, after making some other devises and bequests, proceeded to give a messuage to the same persons, upon trust for his widow for her life, and after her decease, to apply the rents for his grandson *H.* during his minority, and to convey the messuage to *H.* at twenty-one; and he appointed his widow sole executrix. At the time of the widow's death, *H.* had attained twenty-one; and afterwards, by a deed, which recited the devise of the messuage upon the trusts of the will therein stated, the death of the widow, and that, in her lifetime, *H.* attained twenty-one, "whereby it became unnecessary for them to act in the trust declared by the will, and in fact they never intermeddled therein; but inasmuch as the legal estate in the said messuage was still outstanding in them by virtue of the recited will, they had consented, at the request of *H.*, to convey such estate to him," the two persons named in the deed conveyed the devised messuage to *H.*:

Held, that the execution of this deed was of itself sufficient evidence that the persons who executed it had accepted and acted in the trusts of the will.

*JOHN FRANKLING*, by his will, gave and bequeathed unto *Robert Blackburrow* and *Edward Wood* (since deceased) the sum of 1100*l.*, upon trust to invest the same, and to pay the interest thereof to his daughter *Mary*, then the wife of *John Urch*, for her separate use, for life; and after her decease, or in case she should incumber the same, to apply the interest in the maintenance of such of her children as should be then living, (except *John Frankling Hewlett* and *Joseph Hewlett*, her children by a former marriage,) until the youngest should attain the age of twenty-one, when he directed the capital to be equally divided among them. The testator then made certain other devises and bequests;

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quests; and in particular he devised the dwelling-house in which he then lived, with the garden, orchard, and close of ground thereunto belonging, situate at *Banwell*, and held under the Bishop of *Bath* and *Wells*, upon a lease for three lives, unto the same trustees, *Blackburrow* and *Wood*, to hold the same, upon trust, to permit and suffer his wife, *Ann Frankling*, and her assigns, to receive the rents and profits of the premises during her life; and, after her decease, to apply the same in the maintenance and education of his grandson, *John Frankling Hewlett*, until he should attain the age of twenty-one years, when he directed his said trustees, or the survivor, &c., to convey the premises to his said grandson, his heirs and assigns, and also to pay over to him the unapplied rents and profits, accrued during his minority. The testator gave the residue of his estate and effects to his wife, *Ann Frankling*, whom he appointed his sole executrix.

The testator died in the year 1818; and his will was shortly afterwards proved by his widow.

The bill was filed by the parties interested in the legacy of 1100*l.*: it prayed an account of the testator's estate and effects received by the widow, who was now dead, and the Defendant *Walker* as her personal representative, and it further prayed that the Defendant *Blackburrow* might be declared personally liable to make good the legacy in question with interest, on the ground that he had accepted and acted in the trusts of the testator's will.

To support the case made against *Blackburrow*, the bill alleged various acts done, and conversations had by him, with reference to the property given and bequeathed upon the trusts of the will, and which it was submitted

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amounted to or evidenced an acceptance of the trusts of the legacy in question. It also alleged that *Blackburrow* took upon himself to act, and acted, as a trustee, in the paying or assigning over to other legatees named in the will, and, amongst the rest, to the testator's grandson, *John Frankling Hewlett*, property specifically bequeathed in trust for such other legatees.

The Defendant *Blackburrow*, by his answer, positively denied that he had ever accepted or acted in the trusts of the will, or in any way intermeddled with any of the property which was the subject of the trusts, otherwise than by executing, on the 18th of *May* 1822, the indenture after mentioned. His answer then stated that, at the earnest solicitation and request of *John Frankling Hewlett*, he, *Blackburrow*, and *Wood* executed to *Hewlett* an indenture of release, dated the 18th of *May* 1822, and expressed to be made between them, *Blackburrow* and *Wood*, of the one part, and *Hewlett* of the other part, whereby, after reciting an indenture of lease between the Bishop of *Bath* and *Wells* and the testator, and by which the Bishop demised to the testator a messuage, lands, and premises therein described, within the manor of *Banwell*, to hold the same to the testator and his heirs during the lives of three persons therein named, and the longest liver of them; and further reciting that the testator, by his said will, had given and devised unto him, the Defendant *Blackburrow*, and *Wood*, the dwelling-house in which he then lived, with the garden, orchard, and close of ground thereunto belonging, situate at *Banwell* aforesaid, and held under the Bishop of *Bath* and *Wells*, upon trust to permit and suffer *Ann Frankling*, the testator's wife, to receive the rents and profits of the premises during her life, and, after her decease, to apply the same in the maintenance and education of his grandson *John Frankling*

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*ling Hewlett*, until he should attain the age of twenty-one years, when he directed his said trustees, or the survivor &c., to convey the said premises to his grandson, his heirs and assigns, and also to pay over to him the unapplied rents and profits thereof, accrued during his minority; and reciting that *Ann Frankling* survived the testator, but was then also deceased, and that in her lifetime, *John Frankling Hewlett* attained the age of twenty-one years, whereby it became unnecessary for the Defendant and *Wood* to act in the trust declared by the will, and in fact they never intermeddled therein; but, inasmuch as the legal estate in the said messuage and lands was still outstanding in them by virtue of the said recited will, they had consented, at the request of *John Frankling Hewlett*, to convey such estate to him in manner thereinafter mentioned; it was witnessed that, in pursuance and performance of the said agreement, and of the trusts so reposed in them, and for conveying the said messuage or dwelling-house, garden, orchard, and premises, unto him, *John Frankling Hewlett*, and his heirs, as aforesaid, they, the Defendant *Blackburrow* and *Wood*, and each of them, thereby granted and released unto *John Frankling Hewlett* all that the said messuage, &c., granted by the said indenture of lease unto the said testator, and by him given and devised unto *Blackburrow* and *Wood*, upon trust as aforesaid, to hold the same unto *John Frankling Hewlett*, his heirs and assigns, &c.

The depositions on behalf of the Plaintiffs did not succeed in proving any of the acts or conversations which the bill alleged as evidence that *Blackburrow* had accepted the trusts.

The Defendant *Blackburrow* proved, by the evidence of his solicitor, that, before the execution of the deed of

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*May* 1822, a case, together with the draft of the proposed deed, had been laid, on his behalf, before counsel, for his opinion upon the question, whether it would be safe for him and *Wood* to execute such a deed, and that counsel thereupon advised that they might safely execute it.

The decree of the Vice-Chancellor declared, among other things, that *Blackburrow* had accepted the trusts of the will; and directed an inquiry whether, but for his wilful default, he might have received the 1100*l.* or any part thereof.

An appeal by *Blackburrow* against that part of the decree now came on to be heard.

Mr. *Temple* and Mr. *Purvis*, for the appeal.

The only act which furnishes the least pretence for saying that the Appellant ever accepted the trusts of the will is the execution of the deed of *May* 1822, conveying the leasehold property to *Hewlett*. It is obvious, however, that, in becoming a party to that deed, he never intended to make himself liable as a trustee. On the contrary, his declared object in so doing was to repudiate or get rid of any liability in that character: and, although the deed may have been inartificially and improperly framed for that purpose, the Court will look to the expressed object and intent, rather than to the form of the instrument; according to the principles laid down by Lord *Eldon* in the analogous case of *Nicloson* v. *Wordsworth*. (*a*) The deed of *May* 1822 is substantially a disclaimer of the trusts, and it distinctly states, in the recital, that the parties of the first part never

(*a*) 2 *Swan.* 365.

never interfered therein. It is also to be observed that the Appellant, in executing that deed, acted under the advice of counsel, and at the earnest request of *Hewlett*, for the sole purpose of perfecting the title of the latter to the property, the legal estate in which was supposed to have become vested in *Blackburrow* and *Wood* under the will. The recitals in the deed, even supposing them to be binding as between the parties to the instrument, cannot be used as evidence upon any question between those parties and strangers, such as the Plaintiffs must for the present purpose be considered to be. Even if it were fully established, however, that the Appellant had accepted and acted in the trusts of the property devised for the benefit of *Hewlett*, it by no means follows, as a necessary consequence, that he must also be held to have accepted and acted in the trusts of the legacy with which the bill seeks to charge him, or generally in the trusts reposed in him by the will.

Mr. *Jacob* and Mr. *Girdlestone*, in support of the decree.

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*June 9.*

*The* LORD CHANCELLOR (after stating the question).

In this case evidence was gone into for the purpose of shewing that the Appellant had, in certain conversations, admitted himself to be a trustee. Upon carefully looking into the depositions, however, I do not find that this fact is satisfactorily proved; and, although they might have been sufficient to ground an inquiry, I should not have thought that they justified the Court in making a decree against the Appellant.

There was, however, another piece of evidence upon which the Plaintiffs mainly relied; and that was a deed, which

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which the Appellant had executed with respect to certain leasehold property of which also he was appointed a trustee by the will. That leasehold property was bequeathed to him and an individual of the name of *Wood*, upon trust for a person upon his attaining the age of twenty-one; and the deed in question was a conveyance of that leasehold to the person so entitled, and to which the Appellant and his co-trustee were executing parties. This deed contained the following recitals: —

[His Lordship here read the recitals, and stated the effect of the deed, and then continued.]

The question is, whether the execution of this deed was not of itself an acceptance of the trusts of the will? I think it would be sanctioning a gross deceit on the part of the Appellant, if it were to be construed otherwise, because it was for the purpose of giving effect to the devise of the property. If the trustees never did accept the property, then they had no legal estate in them, and they had no means of doing that which they professed to do, and which, by this deed, they held out that they were doing.

In the case of *Nicloson* v. *Wordsworth* (*a*), which was referred to in support of the Appellant's argument, one of three trustees, being desirous of throwing off the obligations of the trust, and disclaiming, executed a release to the other trustees. Now it had been previously decided by Lord *Rosslyn*, in *Crewe* v. *Dicken* (*b*), that that act, of itself, amounted to an acceptance of the trust, upon the groud that it was at once an assumption of the interest and an attempt to get rid of it, — his Lordship thus taking a distinction between a mere disclaimer and a release.

(*a*) 2 *Swan.* 365. (*b*) 4 *Ves.* 97.

release. Lord *Eldon*, in *Nicloson* v. *Wordsworth*, comments upon that case, and questions the soundness of that distinction; but the ground on which Lord *Eldon* rests his objection leaves the present case quite untouched. His Lordship there said, " If the essence of the act is disclaimer, and if the point were *res integra*, I should be inclined to say that, if the mere fact of disclaimer is to remove all difficulties and vest the estate in the other trustees, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer, that the release amounts to more than a disclaimer, is much more technical than any reasoning that deserves to prevail in a court of equity." His Lordship subsequently observed, " My opinion is, that if a person, who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, when the meaning and intent of that conveyance is disclaimer, the distinction is not sufficiently broad for the Court to act upon. I can find no case which has decided, nor can I see any reasons for deciding, that, where the intent of the release is disclaimer, the inference that the releasor has accepted the estate shall prevent the effect of it."

This reasoning has no application to the case of a person who is not repudiating, but acting upon the interests which the will purports to give. Is there any thing on the face of this instrument to show that the Appellant repudiated the trust? He recites that the property vested in him, and that, in execution and pursuance of the trust, he executes the deed in question. It was said, there is a recital that he had not intermeddled. But there is no recital that he never intended to intermeddle, or that he executed the deed because he disclaimed the trust. On the contrary, the reason

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reason assigned is, that the party having attained twenty-one, "it became unnecessary for the Defendant and *Wood* to act in the trust declared by the said will, and, in fact, they never intermeddled therein." So far, therefore, from this instrument showing any intention on his part to repudiate the trust, the Appellant there expressly says that he executes it in pursuance of and acting upon the trust, and is dealing with the property as the testator intended he should deal with it.

It is also to be remarked that, in *Nicloson* v. *Wordsworth*, although the observations of Lord *Eldon* are entitled to the greatest possible weight, there was no adjudication upon the point raised by the case. The bill was filed by a purchaser, stating that the vendor could not make a title, because one of the trustees had refused to join in the conveyance; and the object of the suit was to obtain a declaration from the Court which should clear the title. Lord *Eldon* said that he could not come to any decision; and the declaration was taken by consent, as appears from the terms of the order stated in Mr. *Swanston's* report. (*a*) It cannot, therefore, be considered as the judicial decision of the Court. How far the reasoning of Lord *Eldon* in that case is correct, I am not called upon to express any opinion. At all events, I am clear that it has no bearing in the Appellant's favour; but, on the contrary, that it is quite consistent with the declaration under appeal.

So far, therefore, as his Honor's decree has declared that the Defendant *Blackburrow* has accepted the trusts of the will, I think it is impossible to impeach it.

(*a*) See 2 *Swan.* p. 372.

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BETWEEN

ROBERT SAUNDERS and WILLIAM BENNING - - Plaintiffs.

*June* 16. 20. 22, 23.

AND

JOHN WILLIAM SMITH and ALEXANDER MAXWELL - - Defendants.

Injunction refused to restrain alleged infringement of copyright, before trial at law, where the conduct of the Plaintiffs had been such as, in the opinion of the Court, was calculated to induce the Defendants to believe that the course taken by them would not be objected to by the Plaintiffs.

Whether it is not piracy to print, at full length, cases contained in the Law Reports, although with the addition of notes, however voluminous, *Quære.*

THE bill, filed the on 29th of *May* 1838, and the affidavit of the Plaintiffs, filed on the next day, stated the following facts, viz.: —

That in the year 1787, and within less than twenty-eight years before the 29th of *July* 1814, two several books, being portions of the first volume of a work intituled "Reports of Cases argued and determined in the Court of King's Bench," and commonly known by the name of the "Term Reports," were for the first time printed and published; and that *Charles Durnford*, since deceased, and *Edward Hyde East*, now Sir *Edward Hyde East*, Bart., were the authors of the said books, and the original proprietors of the copyrights of the same:

That at different times, subsequently to the year 1787, and within twenty-eight years before the 29th of *July* 1814, certain other books, being respectively the third, fourth, fifth, sixth, seventh, and eighth volumes of the work intituled "Reports of Cases argued and determined in the Court of King's Bench," and commonly called the "Term Reports," were for the first time printed and published, and that *Durnford* and *East* were the authors of the said several books, and the original pro-

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proprietors of the copyrights of the same; and that *Durnford* died in or about the year 1808, but *East* was still living:

That at different times, subsequently to the year 1800, the several volumes of a work in sixteen volumes, intituled "Reports of Cases argued and determined in the Court of King's Bench," and commonly known by the name of "*East*'s Reports," were for the first time printed and published; and *East* was the author of those several volumes, and the original proprietor of the copyright of the same:

That at different times, subsequently to the year 1822, the several volumes of a work in ten volumes, intituled "Reports of Cases argued and determined in the Court of King's Bench," and commonly known as "*Barnewall* and *Cresswell*'s Reports," were for the first time printed and published; and *Richard Vaughan Barnewall* and *Cresswell Cresswell* were the authors of the said several volumes, and were the original proprietors of the copyright of the same:

That at different times, subsequently to the year 1809, the several volumes of a work in eight volumes, intituled "Reports of Cases argued and determined in the Court of Common Pleas," and commonly known by the name of "*Taunton*'s Reports," were for the first time printed and published; and *William Leonard Thomas Pyle Taunton* was the author of the said several volumes, and the original proprietor of the copyright of the same; and that the fourth volume of the said work was for the first time printed and published after the year 1814; and the eighth volume of the said work was for the first time printed and published after the year 1822:

That

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That at different times, subsequently to the year 1822, the several volumes of a work in ten volumes, entitled "Reports of Cases argued and determined in the Court of Common Pleas and other Courts," and commonly known by the name of "*Bingham's* Reports," were for the first time printed and published; and *Peregrine Bingham* was the author of the said several volumes, and the original proprietor of the copyright of the same:

That the copyrights of and in each and every of the books hereinbefore mentioned had been assigned, for valuable consideration, by the respective authors of those works, by deeds or instruments in writing, duly executed, and by divers assignments by deeds or instruments in writing, duly executed, had been assigned, for valuable consideration, to, and had become vested in the Plaintiffs; and all right and interest, title, property, and claim whatsoever, which the respective authors of the said several books at any time had or could have had in the same respectively, and the copyright thereof, and the said books, and the copyright thereof, and all profits, benefits, and advantages to arise from printing or vending the same, had become vested in and now belonged to the Plaintiffs; and that they had paid very large sums of money for the several copyrights, and that the capital invested by them in copyrights was to a large amount:

That the copyright of the before-mentioned portions of the first volume of the "Term Reports," and the fourth and eighth volumes of "*Taunton's* Reports," and each and every of the said other volumes and books before mentioned, was still subsisting and unexpired, and by virtue of the several acts of parliament in that behalf mentioned, and now in force, the Plaintiffs

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tiffs alone had the sole and exclusive right of printing and reprinting those several books; and that no consent in writing or otherwise had been given by them or either of them, authorising the Defendants to print or reprint, or cause to be printed or reprinted, the before-mentioned several books, or any part or parts of them, or of any of them:

That *John William Smith*, of the *Inner Temple*, barrister at law, and *Alexander Maxwell*, of *Bell Yard*, in the county of *Middlesex*, bookseller, had lately caused to be printed, and on the 12th of this present month of *May*, for the first time, published, and had since exposed to sale and sold, divers copies of a certain book, intituled "A Selection of Leading Cases on various Branches of the Law, with Notes, vol. ii. part 1., by *John William Smith*, Esq., of the *Inner Temple*, Barrister at Law:"

That the greater part of the last-mentioned book had been copied and pirated by the Defendants, without the consent of the Plaintiffs, from the several books before mentioned, the copyright of which was vested in the Plaintiffs:

That the book so printed and published by the Defendants consisted, in the whole, of 305 pages, out of which 182 pages were copied *verbatim*, except a very few trifling and minute verbal alterations in six of the cases, from parts of the Plaintiffs' said several books; and that the book contained twenty-seven cases, all of which, except three, were copied *verbatim*, except as before mentioned, from the Plaintiffs' said several books:

That the following parts of the Defendants' book were copied *verbatim* from the works of which the copy-

copyright was vested in the Plaintiffs, viz., eight pages, containing the case of *Cutter* v. *Powell*, from the sixth volume of the Term Reports; six and a half pages, containing the case of *Bickerdike* v. *Bollman*, from the before mentioned portion of the first volume of the Term Reports; seven and a half pages, containing the case of *J'Anson* v. *Stuart*, from the before-mentioned portion of the first volume of the Term Reports; eleven pages, containing the case of *Bent* v. *Baker*, from the third volume of the Term Reports; sixteen pages, containing the case of *Pasley* v. *Freeman*, from the third volume of the Term Reports; two pages, containing the case of *Doe dem. Rigge* v. *Bell*, from the fifth volume of the Term Reports; one page, containing the case of *Clayton* v. *Blakey*, from the eighth volume of the Term Reports; two pages, containing the case of *George* v. *Clagett*, from the seventh volume of the Term Reports; seven pages, containing the case of *Smith* v. *Hodson*, from the fourth volume of the Term Reports; fifteen pages, containing the case of *Elwes* v. *Maw*, from the third volume of *East*'s Reports; twenty-three pages, containing the case of *Horn* v. *Baker*, from the ninth volume of *East*'s Reports; nine pages, containing the case of *Wain* v. *Warlters*, from the fifth volume of *East*'s Reports; eight pages, containing the case of *Godsall* v. *Boldero*, from the ninth volume of *East*'s Reports; seven pages, containing the case of *Rose* v. *Hart*, from the eighth volume of *Taunton*'s Reports; eleven pages, containing the case of *Higham* v. *Ridgway*, from the tenth volume of *East*'s Reports; seven pages, containing the case of *Paterson* v. *Gandasequi*, from the fifteenth volume of *East*'s Reports; seven pages, containing the case of *Addison* v. *Gandassequi*, from the fourth volume of *Taunton*'s Reports; ten pages, containing the case of *Thomson* v. *Davenport*, from the ninth volume of *Barnewall* and *Cresswell*'s Reports; seven and a half pages, containing the case of *Bauer-*

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*man* v. *Radenius*, from the seventh volume of the Term Reports; two pages, containing the case of *Marriot* v. *Hampton*, from the seventh volume of the Term Reports; six pages, containing the case of *Montague* v. *Benedict*, from the third volume of *Barnewall* and *Cresswell's* Reports; four pages, containing the case of *Seaton* v. *Benedict*, from the fifth volume of *Bingham's* Reports; one and a half page, containing the case of *Merryweather* v. *Nixan*, from the eighth volume of the Term Reports; and three pages, containing the case of *Vicars* v. *Wilcocks*, from the eighth volume of *East's* Reports:

That the Defendants had sold great numbers of copies of the books so published by them, and had, as the Plaintiffs believed, received considerable sums of money in respect of such sales, and that considerable sums of money were now owing to them in respect of such sales:

That the copyright of the Plaintiffs in the several works so belonging to them, had been pirated and infringed by the conduct of the Defendants; and the publication and sale of the book published by the Defendants, had, as the Plaintiffs believed, caused, and was likely to cause, loss and damage to the Plaintiffs, and to injure the sale of their books, and tended to deprive the Plaintiffs of the benefit of their copyright, and of the profits, emoluments, and advantages they would otherwise have derived, and would hereafter derive therefrom:

That in the year 1837, the Defendants published the first volume of their work, and that the reports of the cases contained in that first volume were taken and copied from various books, the copyright of some of which belonged to the Plaintiffs:

That

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That they did not take any means to prevent the sale of that first volume, because, out of forty-two cases contained in the said first volume, only the case of *Master* v. *Miller*, and part of the cases of *Mills* v. *Auriol* and *Lickbarrow* v. *Mason*, were copied from books of which the Plaintiffs have the copyright, and the Plaintiffs did not consider such infringement of their rights to be carried to such an extent as to render it worth their while to take any proceedings in respect of the same; however, the Plaintiffs never gave the Defendants any reason to believe or expect that the Plaintiffs assented or would assent to or acquiesce in the infringement of their copyright:

That the Defendant, *John William Smith*, previously to the publication of the said first volume, proposed to the Plaintiffs to publish the said work, and to be interested with him in the profits thereof, which proposal the Plaintiffs declined: and that *Smith* stated, as a reason why he should prefer having the work published by the Plaintiffs, that he should otherwise be unable to make use of the cases contained in reports published subsequently to the Term Reports; and that the Plaintiff, *Benning*, thereupon observed to *Smith*, that he, *Smith*, certainly could not take any cases the copyright of which belonged to the Plaintiffs:

That for some time after the first publication of the first part of the second volume, and until on or about the 19th of *May* 1838, the Plaintiffs were not aware of the nature of the contents of the second volume, but presumed that it was similar to the first part, and did not interfere with any of the Plaintiffs' copyrights, or only in a very small and trivial degree: and that as soon as they were aware that a great part of the second volume was copied from books the copyright of which belonged to the Plaintiffs, they immediately complained of the piracy,

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and their solicitor, on their behalf, wrote and sent to the Defendant *Maxwell* a letter, in the words or to the purport following: — "*Temple*, 21st *May* 1838. Sir, Our clients, Messrs. *Saunders* and *Benning*, of *Fleet Street*, have placed in our hands vol. II. part 1., of '*Smith's* Selection of Leading Cases,' which appears to be published by you. On their behalf we beg to inform you that the publication of that work is an infringement of and interference with their rights, and we shall forthwith take the necessary proceedings against you for such infringement, and for the redress for any injury that may have been occasioned to our clients by such publication. Your obedient servants, *Milne*, *Parry*, *Milne*, and *Morris*. To Mr. *Maxwell*:"

That on the 19th of *May* they gave instructions for proceedings to be taken in this Court for relief:

That the Defendants are, as the Plaintiffs believe, jointly interested in the book, entitled, "A Selection of Leading Cases on various Branches of the Law," and in the first part of the second volume thereof; and that they intend to print and publish a second part of the second volume, and to print, in such second part, divers parts of books, the copyright of which belongs to the Plaintiffs.

The bill prayed an account of the Defendants' receipts in respect of the first part of the second volume of the "*Leading Cases*," and an injunction to restrain its further sale; and the delivery up of all copies in the Defendants' hands; the Plaintiffs waiving all penalties.

The Defendant *Smith*, by his affidavit, stated that he was the author of the work mentioned in the Plaintiffs' affidavit.

That

That his object in composing the work was explained in the preface to the first volume, and the advertisement to part 1. of the second volume:

That the composition of the notes was by far the most laborious part of the undertaking: That before the publication of the first volume, the deponent sent for the Plaintiff *Benning*, who waited on the deponent at his chambers, and the deponent then proposed to *Benning* that he and his partner should become the publishers of the work, and should pay the deponent a certain sum of money for the first edition, and account to him for half the profits of every subsequent edition: That the deponent on that occasion told *Benning* that he made him the first offer of the work, and that his reason for doing so was that, in order to complete his plan, it would be necessary to take cases from modern reports, the copyright of most of which was, as he believed, vested in the Plaintiffs: That *Benning* requested time to consider the deponent's offer and consult his partner on it, and, on a subsequent occasion, came again to the deponent and declined it, but offered that he and his partner would publish the work at half profits, which the deponent declined:

That he never offered the work to the Plaintiffs on any other occasion, and that he is sure that he did not express an opinion that he should be unable to make use of the cases contained in the reports published subsequently to the Term Reports, in case of his not publishing the said work with the Plaintiffs, although he would have preferred that the work should have been published by the Plaintiffs, on account of the necessity of inserting such modern reports:

That it always was and still is the deponent's intention to confine the work to two volumes, to be

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completed on the plan of the portion of it already published:

That each and every of the cases taken from the reports of Sir *Edward Hyde East*, *Barnewall* and *Cresswell*, *Bingham*, and *Taunton*, as well as the cases from the early reports, were intended as illustrative of a principle of law, on which a commentary or exposition was contained in notes appended to such cases or series of cases, and which notes had been composed with great labour and attention:

That his understanding with *Alexander Maxwell* was that the second volume should consist of about 700 pages, and that it was not the deponent's intention to exceed that number.

The Defendant *Maxwell*, by his affidavit, stated, that he entered into an engagement with the other Defendant, *Smith*, for the publication of the work in question, to be completed in two volumes royal octavo, beginning with the earliest reports, to the present time, and adapted to the use of students in the profession, and for convenience of reference on circuits:

That the engagement was entered into under the full conviction, not only of its utility, but also of its being conformable with the practice of legal writers, founded in usage and custom, as essential to the publication of law books in general:

That, from his experience as a law bookseller, he did not believe that the publication and sale of the book intitled "*Smith's Selection of Leading Cases*," published by the deponent, had caused or was likely to cause loss or damage to the Plaintiffs, or to injure the sale of their books, or had tended or would tend to deprive

prive the Plaintiffs of the benefit of their copyrights, and of the profits, emoluments, and advantages in respect of the same:

That he believed that the book, being designed for the use of students, and the portion already published containing in the whole only sixty-one cases, cannot interfere with the sale of the property of the Plaintiffs as books of reference; but, on the contrary, the deponent, from long experience as a law bookseller, verily believed that, so far from its being prejudicial to the sale of the reports from which such cases were taken, it was calculated to increase the ultimate sale of such books of reports:

That, two or three months ago, and after the publication of the first volume of *Smith's Leading Cases*, the Plaintiff *Benning* called upon the deponent, for the purpose of requesting liberty for the Defendant *Smith* to make use of his work on *Patents*, of which the deponent had the copyright, and to adopt it in his (the Defendant *Smith*'s) work on *Commercial Law*, now in the course of being printed:

That he, on that occasion, mentioned to the Plaintiff *Benning* that he understood that the Plaintiffs were then desirous of having a share in *Smith's Leading Cases;* and that the deponent was willing to grant the same, provided that they would give him a proportionate share in *Smith's Commercial Law*, in exchange; and though the Plaintiff *Benning* stated that his partner would not accede to such a proposition, he made no complaint or observation to the deponent as to the publication of *Smith's Leading Cases* in any way interfering with any copyright of the Plaintiffs:

That his understanding with the Defendant *Smith*, previously to his purchasing the work, was, that the

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completed on the plan of the portion of published:

That each and every of the cases reports of Sir *Edward Hyde Ea* *Cresswell*, *Bingham*, and *Taunton*, from the early reports, were inter principle of law, on which a co was contained in notes append of cases, and which notes great labour and attention.

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laintiffs having, on the 9th of *June*, moved, be- ne Vice-Chancellor, for an injunction to restrain e publication of the first part of the second volume, his Honor refused the application, but gave the Plaintiffs leave to bring an action, and liberty to all parties to apply to the Court as they might be advised.

The motion was now renewed before the Lord Chancellor.

Mr.

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In this case, moreover, the quantity of the Plaintiffs' matter which has been copied by the Defendants is very great, and that is a circumstance material, as showing that the case is unequivocally one of piracy. It is said, indeed, that each of the Plaintiffs' books consists of many volumes, and that the cases copied by the Defendants from

(*a*) See the next case.

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second volume should consist of about 700 pages; and that it was not the intention of the Defendant *Smith* to exceed that number.

The motto of the book was, "It is ever good to relie upon the book at large; for many *Compendia sunt dispendia;* and *melius est petere fontes quam sectari rivulos,* 1 *Inst.* 305. *b.*"

The preface contained the following passage:— "The period over which this collection extends commences in the forty-fourth *Elizabeth,* and terminates in the thirty-fourth *George* III.; *Twyne*'s case being the earliest, and *Waugh* v. *Carver* the latest case in the volume. The oldest reports made use of are Lord *Coke*'s, the most modern *Henry Blackstone*'s. It would have been impossible to carry the work down to the present day without the addition of another volume: this addition will, however, be made, should that which is now published be found adapted for the purposes to which it is intended to be subservient."

In a catalogue issued by the Plaintiffs in the beginning of the year 1838, the first volume of the book in question appeared among the books sold by them, with a note in these words, "A second volume is in the press."

The Plaintiffs having, on the 9th of *June,* moved, before the Vice-Chancellor, for an injunction to restrain the publication of the first part of the second volume, his Honor refused the application, but gave the Plaintiffs leave to bring an action, and liberty to all parties to apply to the Court as they might be advised.

The motion was now renewed before the Lord Chancellor.

Mr.

Mr. *Jacob*, and Mr. *James Russell*, in support of the motion.

In a volume of Law Reports, the report of each case is an entire thing; not necessarily or generally connected with the reports of other cases which precede or follow it; and it might be, and sometimes is, published alone, as a separate pamphlet; as, for instance, the report of the case of *Cholmondeley* v. *Clinton*. It is understood that the Vice-Chancellor's judgment was mainly influenced by the decision which it was represented to his Honor that your Lordship had pronounced in the case of *Bramwell* v. *Halcomb* (*a*), in which it was said to have been determined by your Lordship that the Plaintiff was not entitled to an injunction, because the quantity of his work which the Defendant had taken bore but a small proportion to the whole: but a grave question in that case was, whether Mr. *Bramwell*, the Plaintiff, had any copyright at all in those parts of his book which the Defendant was said to have copied, the Plaintiff's book being a mere compilation. In the present case, however, the Plaintiffs' copyright is fully admitted, as is the piracy also; but then the justification attempted to be set up is, that the Defendant's book will be very useful; as if it could be tolerated that an infringement of the rights of property should be justified by such an allegation as that.

In this case, moreover, the quantity of the Plaintiffs' matter which has been copied by the Defendants is very great, and that is a circumstance material, as showing that the case is unequivocally one of piracy. It is said, indeed, that each of the Plaintiffs' books consists of many volumes, and that the cases copied by the Defendants from

(*a*) See the next case.

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from any such book are very few in proportion to the number reported in all the volumes of which the book consists. Lord *Eldon*'s doctrine, however, in *Mawman* v. *Tegg* (*a*) entirely displaces any such argument, for his Lordship states, again and again, that, with respect to the piracy of a part of a work, the Court interferes as in the case of a piracy of the whole. Then, it is said, that the Defendant's work is only an institutional book, for the use of students, and will not interfere with the sale of the reports. This, however, is not so, for the notes would not be intelligible to students; and it is clear that it is intended that the cases themselves shall be read in the Defendants' book, and that that book shall form a substitute for the reports; but, whatever may have been the intention, such will be the result. If one man may reprint some cases, or even one case in one book, another man may reprint other cases or another case in another book; and thus the whole contents of every one of the books to which the Plaintiffs' copyright extends may be pirated; *Whittingham* v. *Wooler* (*b*), *Wilkins* v. *Aikin*. (*c*)

It will be said that the Plaintiffs have, by neglecting to take steps to restrain the publication and sale of the first volume, induced the Defendants to persevere in their undertaking and to publish the second; but neither of the Defendants swears that he was induced to go on by any thing the Plaintiffs did or omitted to do; nor does either of the Defendants swear even to his belief of the legality of what they have been doing. Besides, the quantity taken from the Plaintiffs' books for the first volume was too small to be worth complaint, and the Plaintiffs could not know what the contents of the second volume would be.

Mr.

(*a*) 2 *Russ.* 385.; see p. 390.
(*b*) 2 *Swanst.* 428.
(*c*) 17 *Ves.* 422.

Mr. *Wigram*, Mr. *Willcock*, and Mr. *Warren*, *contrà*.

It will not be disputed that a writer is entitled to copy, *in extenso*, parts of a previous work. Mr. *Chitty*, in his work on Bills, has collected all the cases on the subject of bills, and printed them at full length, and they fill one entire volume. In that case, if a bill had been filed, two questions might have been made; first, whether the book was not substantially a new and original work; and, secondly, whether it was a piratically intended use of the Plaintiff's book. So, Mr. *Tidd Pratt* has published, in his books, reprints of cases on the Poor Laws, the Bankrupt Laws, and so forth. So, *Harrison's Digest* contains 16,000 marginal notes, in which there is as much copyright as in the bodies of the cases, and each of which has cost the reporter considerable care and pains. The result of the decisions upon questions of infringement of copyright is, that the Court has felt itself bound to inquire, in the first place, is the work new and original? and, secondly (as in *Mawman* v. *Tegg* (*a*)), is it published with a piratical intent? but the Court has in no case granted an injunction, unless there has been what is actually, in law, a piracy; and in no case of actual piracy has the Court failed to ask, can this work become a substitute for the old one? and, if the question has been satisfactorily answered in the negative, and the work has been new and original, the injunction has been invariably refused.

The principle upon which the Court grants injunctions in cases of this sort is the same as that upon which it decrees specific performance of contracts; viz., because it cannot give the Plaintiff compensation in damages; but the objection to the injunction in this case is, that the Court, by granting it, would be giving the Plaintiffs the largest possible

(*a*) 2 *Russ.* 385.

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possible damages to which they can be entitled, and yet the damage may be so minute that it is impossible to appreciate it, and that, too, in a case, like the present, in which the Defendant has been led into enormous expense with the connivance of the Plaintiff; for, in Messrs. *Saunders* and *Benning*'s Catalogue of Law Books sold by them, which was issued at the beginning of this year, appears the first volume of *Smith's Leading Cases*, with a notice that a second volume is in the press.

The work in question is, substantially, any thing but a piracy: for the substantial part of it consists of the treatises on the law which are contained in the notes.

The *Term Reports*, *East's Reports*, *Taunton's Reports*, *Barnewall* and *Cresswell's Reports*, and *Bingham's Reports* may be termed five works, containing fifty-two volumes and 39,198 pages: from the *Term Reports* twelve cases have been taken, or one and a half per volume; from *East*, seven cases, which is less than half a case per volume; from *Taunton* two cases, being a quarter of a case per volume; from *Barnewall* and *Cresswell* two cases, being one fifth of a case per volume; from *Bingham*, one case, being one tenth of a case per volume. The whole amount borrowed extends over 128 of the Plaintiffs' pages, and 190 of the Defendants', and, of the 15,340 cases, the Defendants have published twenty-four.

With reference to the argument that each case is a separate work, it is to be observed that the words in the Copyright Act are "book or books;" and when a person takes in law reports, it is with a tacit promise, on the part of the booksellers, that he shall have an historical account of the proceedings of the Court.

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As to the argument, that different persons might take different parts of a book, and thus the whole be pirated, it is a sufficient answer to say that a person might buy up sets of sermons, until he had got the whole of the Scriptures, or, at all events, the leading parts of the Scriptures.

*Roworth* v. *Wilkes* (*a*), *Cary* v. *Kearsley* (*b*), *Whittingham* v. *Wooler* (*c*), *Dodsley* v. *Kinnersley* (*d*), *Tonson* v. *Walker* (*e*), *Wilkins* v. *Aikin* (*g*), *Mawman* v. *Tegg* (*h*), *Bramwell* v. *Halcomb* (*i*), and *The Trustees of the British Museum* v. *Payne* (*k*), were cited.

Mr. *Jacob*, in reply.

The Defendant *Maxwell*, in his affidavit, says, that the proceeding adopted in the compilation of this book is according to usage and custom; but what usage and custom is there such as this, among law writers? Besides, the preface to the book states that the plan is entirely new. Certainly it is, and the book may be, as the other side contend, a very useful book; but the more useful and saleable it is, the more injury it does to the Plaintiffs. The cases mentioned, in which authors have copied reports of cases into their works on the subjects to which the cases relate, cannot apply; for it does not appear that the authors did not obtain the sanction of the proprietors of the copyrights; but, if they did not, the Court will not suffer the law to be violated in this instance, because it may have been violated with impunity in two or three other instances.

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*The*

(*a*) 1 *Campb.* 94.
(*b*) 4 *Esp.* 168.
(*c*) 2 *Swanst.* 428. n.
(*d*) *Ambler*, 403.
(*e*) 3 *Swan.* 672.
(*g*) 17 *Ves.* 422.
(*h*) 2 *Russ.* 385.
(*i*) *Infrà*, p. 737.
(*k*) 4 *Bingh.* 540.

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*June* 23.

*The* LORD CHANCELLOR.

I have looked through the affidavits, and the authorities which have been referred to, and I am clearly of opinion that the Vice-Chancellor came to the right conclusion, and that his order ought to be supported; and I have formed that opinion upon grounds which make it quite unnecessary for me to go into the question of law, which has been discussed at the bar.

This Court exercises its jurisdiction, not for the purpose of acting upon legal rights, but for the purpose of better enforcing legal rights, or preventing mischief until they have been ascertained. In all cases of injunctions in aid of legal rights—whether it be copyright, patent right, or some other description of legal right which comes before the Court—the office of the Court is consequent upon the legal right; and it generally happens that the only question the Court has to consider is, whether the case is so clear and so free from objection upon the grounds of equitable consideration, that the Court ought to interfere by injunction, without a previous trial at law, or whether it ought to wait till the legal title has been established. That distinction depends upon a great variety of circumstances, and it is utterly impossible to lay down any general rule upon the subject, by which the discretion of the Court ought in all cases to be regulated.

In this case, I find the publication complained of to be of a character which, whether it be or be not an infringement of the copyright of the Plaintiffs, is a course of proceeding which has been pretty largely admitted, and pretty generally adopted. Several cases occurred to me, and several were mentioned to me at the bar, in which a gentleman at the bar, desirous of publish-

publishing a work upon a particular subject, has collected the cases upon that subject, and has taken those cases, generally speaking, verbatim, from reports which are covered by copyright. No instance has been represented to me in which those entitled to the copyright have interfered; no judgment, therefore, has been pronounced upon that subject. I am not stating whether the owner of the copyright is entitled to interfere in such a case, or whether that use of published reports is or is not to be permitted. That is a question of legal right, upon which I find, at present, no reason for coming to an adjudication. But, in considering whether I am to exercise an equitable jurisdiction in such a case, before the legal right has been established, it is very important to observe, that, for many years, such a course as I have stated has been pretty generally adopted; more particularly, when I find that these Plaintiffs have themselves acquiesced in a similar course of proceeding. In a book which was mentioned in the course of the argument, I mean *Chitty on Bills*, I don't know whether all the cases are printed verbatim, but certainly many cases are printed, verbatim, from the published reports, of which the Plaintiffs have the copyright. Whether that was a matter of indulgence or not, it could not have been a matter of arrangement; for I put that to the learned counsel at the time, who had the opportunity of satisfying themselves whether it was or was not so. I repeat, that I state this case, not for the purpose of showing that the proceeding I have stated interfered with the legal right, but for the purpose of considering whether I ought to exercise jurisdiction by injunction before that legal right is established.

The case, however, may be carried very much farther; for I find, in the dealings of the Plaintiffs in this case, what amounts to that species of conduct which prevents,

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prevents, in this stage of the cause at least, the interposition of this Court.

Before I observe upon these facts, I will refer to what Lord *Eldon* said in *Rundell* v. *Murray* (*a*), a case certainly very much stronger than the present, but in which Lord *Eldon* lays down the rule which ought to regulate the discretion of the Court in cases of this sort. The owner, or the party who asserted the copyright, had permitted Mr. *Murray* to publish the work, which, after a certain time, turned out to be productive; and, fourteen years having elapsed since the transaction took place, the Plaintiff was desirous of reasserting her title to the copyright, and gave notice to Mr. *Murray*, not to publish after that time, as she herself was desirous of publishing. Lord *Eldon* refused the injunction for which she applied, and, after commenting upon the case, said, "There has often been great difficulty about granting injunctions where the Plaintiff has previously, by acquiescing, permitted many others to publish the work; where ten have been allowed to publish, the Court will not restrain the eleventh. A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application; and, therefore, without saying with whom the right is, whether it is in this lady, or whether it is concurrently in both, I think it is a case in which strict law only ought to govern." (*b*) Lord *Eldon* there lays it down, that not only conduct with the party with whom the contest exists, but conduct with others may influence the Court in the exercise of its equitable jurisdiction by injunction. Now, here, I find permission, whether express or implied, given to others.

I now

(*a*) *Jacob*, 311. (*b*) *Jacob*, 316.

I now proceed to advert to the particular facts appearing in this case; and here, unfortunately, there is some discrepancy in the statements made in the affidavits; but there are some facts unquestionably clear from all doubt. What is stated in the preface to the first volume appears to me to afford me a very safe guide as to what parts of the affidavits to follow. It is to be understood that I assume that the Plaintiffs are entitled to the copyright which they assert.

[His Lordship then proceeded to read the statement contained in the Plaintiffs' affidavit, as to what passed between Mr. *Benning* and Mr. *Smith* before the publication of the first volume.]

From the number of the modern reports, of which the Plaintiffs have the copyright, it was natural to suppose that Mr. *Smith* could not publish his book without using some of the reports of which the Plaintiffs had the copyright. The Plaintiffs say, that Mr. *Smith* stated reasons why he should *prefer* that they should publish his book; but they do not represent him as asking a permission, without which he could not carry on his undertaking.

Now, the fact is, that the first volume was published in *March* 1837: and in the preface I find this announcement: "The period over which this collection extends, commences in the 44 *Elizabeth*, and terminates in the 34 *G.* 3., *Twyne*'s case being the earliest, and *Waugh* v. *Carver* the latest case in the volume. The oldest reports made use of are Lord *Coke*'s; the most modern *Henry Blackstone*'s. It would have been impossible to carry the work down to the present day, without the addition of another volume: this addition will hereafter be made, should that which is now published be

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found adapted for the purposes to which it is intended to be subservient." Here is, therefore, a statement by Mr. *Smith*, in *March* 1837, that if the first volume succeeds, there is an intention of carrying it down by the addition of another volume. That is made after a supposed conversation between one of the Plaintiffs and the Defendant Mr. *Smith*, in which the latter was informed that he could not take any cases, the copyright of which belonged to the Plaintiffs. This preface, however, was a notice not only to the Plaintiffs, but also to those by whom this application is made, that he intended to do it.

Then Mr. *Smith*, by his affidavit, makes a statement of what passed between him and the Plaintiff Mr. *Benning*. [His Lordship read the affidavit.] This statement is quite consistent with one passage in the Plaintiffs' affidavit, in which Mr. *Smith* is stated to have said that he should prefer dealing with the Plaintiffs; and it was very natural, that, as he was using the Plaintiffs' property — whether he had a right to use it or not — he should prefer dealing with them. Mr. *Smith* positively denies that which the Plaintiffs impute to him, namely, that he expressed an opinion that he should be unable to make use of the cases contained in the reports published subsequently to the Term Reports, in case of his not publishing his work with the Plaintiffs; but he leaves untouched the passage in the Plaintiffs' affidavit, which states that Mr. *Benning* observed to him, "that he certainly could not take any cases, the copyright of which belonged to the Plaintiffs." I can come to no conclusion as to that which is said to have been so stated to him; but I have the concurrence of both affidavits as to the proposal made by Mr. *Smith*. Then I have the preface to the Defendant's book, and I have no doubt, upon the result of these two affidavits, that it

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was known to the Plaintiffs, before the first volume was published — and, indeed, they acknowledge that they knew — that the first volume did contain some cases taken from their books, and that it was intended to carry on the work to a more recent time; and when the work is published, they have a distinct statement, on Mr. *Smith*'s part, that he intends to do so.

I do not find, in either affidavit, any statement of an intention, on the part of the Plaintiffs, to apply for an injunction to restrain the publication or sale of the first volume. The reason which has been stated at the bar, namely, that the injury was too small to make it worth while to interfere, may be an explanation of that circumstance; but yet that is not exactly the view the Plaintiffs must have taken of the case; for, according to what was stated in the preface to the first volume, and according to what was communicated to them by Mr. *Smith*, they knew that the first volume was merely the commencement of the plan, and that it was intended to bring it down to more modern times, in the reports of which the Plaintiffs were more immediately interested. They do not complain, however; and there is nothing before me to shew that they interfered, after the publication of the first volume, to caution Mr. *Smith* against interfering with their rights. On the contrary, I find, by an affidavit made by Mr. *Maxwell*, a statement of a communication between himself and one of the Plaintiffs, after the publication of the first volume, and which is not met by any affidavit of the Plaintiffs in reply. Mr. *Maxwell*, in his affidavit, which was sworn on the 31st of *May*, says that "two or three months ago" he "mentioned to the said Plaintiff, *William Benning*, that he understood that the Plaintiffs were desirous of having a share in '*Smith*'s Leading Cases,' and that the deponent was willing to grant the same, provided that they

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would give him a proportionate share in '*Smith*'s Commercial Law' in exchange; and though the said Plaintiff, *William Benning*, stated his partner would not accede to such a proposition, he made no complaint or observation to the deponent as to the publication of '*Smith*'s Leading Cases' in any way interfering with any copyright of the said Plaintiffs."

Now this communication took place when the first volume had been published eleven months, and after the first part of the second volume had not only been announced, but had been included in a catalogue published by the Plaintiffs themselves. Can it be supposed that their attention was not drawn to the fact, not only of what had been done, but of what Mr. *Smith* had announced his intention of doing?

Now, when I look at this book — I am not sufficiently acquainted with it to give an opinion upon its merits — but I have no doubt that the opinions expressed by others who have had more opportunities of examining it, are deserved — when I look at this book, I see that it is a work of very great labour, and I find the principle is to take, first, the marginal note, sometimes with some alteration, and then to take the leading case, as a principle, and then, by very voluminous and obviously laborious notes, to work out the principle. It is clear, therefore, that the work is one of great labour, and that this was evident from the first volume; and I find that the Plaintiffs were informed, in *March* 1837, of an intention to deal with the existing reports in the manner now complained of. I find the first volume published, announcing the intention of going on with the same plan, which necessarily would run over the period to which the copyrights of the Plaintiffs relate, and that no remonstrance is made to Mr. *Smith* upon the nature

of

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of the work, but he is permitted to go on with this laborious undertaking until the period at which the first part of the second volume is published. In the mean time, there was a communication between the Plaintiffs and Mr. *Maxwell*, who was interested in the publication of the work, and who has as much right to the protection of the Court as Mr. *Smith*; and, in the proposal which he makes to the Plaintiffs, he deals with the work as property he is entitled to deal with, wishing to make it the subject of arrangement between himself and the Plaintiffs; and I do not find that this leads to any caution or interference on the part of the Plaintiffs as to that course which Mr. *Smith* had pursued in part, and which the Plaintiffs must have been fully aware that he intended to pursue farther.

I do not give any opinion upon the legal question. I am only to decide whether the Plaintiffs are entitled, under the circumstances, to the interposition of the Court to protect their legal right, when that legal right has not yet been established. But I assume the existence of the legal right, and I say, that whatever legal right the Plaintiffs may have, the circumstances are such as to make it the duty of a Court of Equity to withhold its hand, and to abstain from exercising its equitable jurisdiction, at all events until the Plaintiffs shall come here with the legal title established.

In doing this, I am only doing what Lord *Eldon* did in *Rundell* v. *Murray* (*a*), and what is very generally done upon questions of patent right. The Court always exercises its discretion as to whether it shall interfere by injunction before the establishment of the legal right.

I am

(*a*) *Jacob*, 311.

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I am quite clear that the Vice-Chancellor was right, and that it is not the duty of the Court to interfere by injunction in this case — at all events in the present stage of the cause — and therefore I must refuse this motion with costs.

Before I dismiss the subject, however, I wish to say a few words with respect to a case which appears to have been relied upon by the Vice-Chancellor in his judgment, and which has not been reported. (*a*) It is quite clear that his Honor had not any accurate information with respect to the result of that case; for he supposed, from the representations made to him, that I had decided it upon a calculation of the quantity of the Plaintiff's book which had been taken by the Defendant. In the first place, I never decided that case at all; for it went off upon an arrangement between the parties. Mr. *Halcomb* pressed that the injunction should be dissolved, and that a particular inquiry, which could only be directed by the consent of the parties, should be ordered; and, upon that, the injunction was dissolved. Then it appeared that there had been an assignment of the copyright, which brought other parties into the field, and, of course, nothing could be done finally to dispose of the case, and it stood over, and was never brought on again. I understand that it fell to the ground in consequence of the death of Mr. *Bramwell* in the mean time.

So far, however, from considering that the question turned upon a mere measure of quantity, I find, from a note with which Mr. *Craig* has furnished me, that I said, in the course of the argument, "When it comes to a question of quantity it must be very vague. One writer

(*a*) See now p. 737. *infrà*.

writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value that is always looked to. It is useless to refer to any particular cases as to quantity." Now there could hardly be anything less likely to lay down a rule as to quantity. Indeed, quite the reverse; and yet that is all which appears to have been said by me upon the question of quantity. There was no judgment at all, however, upon the general question of law; and the course I adopted in that case is exactly the course which I adopt now, and proceeded upon the same principle; namely, that the injunction would be an extreme hardship upon the Defendant, as compared with the hardship the Plaintiff would sustain, by being put, in the first instance, at all events, to establish his title at law.

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Motion refused, with costs.

## BRAMWELL *v.* HALCOMB.

1836. *July* 6, 7.

THE Plaintiff was the author of a Treatise upon the Manner of Proceeding on Bills in the House of Commons, and the Defendant *Halcomb* was the author of a Practical Treatise on passing Private Bills through both Houses of Parliament. The bill was filed for an injunction to restrain the publication of the Defendant's book, upon the alleged ground that it contained very numerous passages copied from the Plaintiff's work.

The question whether one author has made a piratical use of another's work, does not necessarily depend upon the quantity of that work which he has quoted or introduced in his own book.

The

Where there is any doubt as to the exclusive legal title of a party claiming an injunction in aid of that legal title, the Court will not exercise jurisdiction without giving an opportunity of trying the legal title by proceedings at law.

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The *Solicitor-General* and Mr. *Halcomb*, for the Defendant, moved to dissolve the injunction which had been granted by the Vice-Chancellor.

Mr. *Stuart* supported the injunction.

The following cases were cited and commented upon on one side or other; viz. *Miller* v. *Taylor* (*a*), *Cary* v. *Kearsley* (*b*), *Roworth* v. *Wilkes* (*c*), *Longman* v. *Winchester* (*d*), *Wilkins* v. *Aikin* (*e*), *Mawman* v. *Tegg*. (*g*)

Mr. *Stuart* contended, amongst other things, that the quantity of Mr. *Bramwell*'s book, which had been quoted by Mr. *Halcomb*, would be an unfair quantity, even if Mr. *Halcomb* had avowed that he took it from Mr. *Bramwell*; and he referred to *Mawman* v. *Tegg*. (*h*)

*The* LORD CHANCELLOR.

When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity.

In my view of the law, Lord *Eldon*, in *Wilkins* v. *Aikin* (*i*), put the question on a most proper footing. He says "The question upon the whole is, whether this is a legitimate use of the Plaintiff's publication, in the fair exercise of a mental operation, deserving the character of an original work."

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(*a*) 4 *Burr*. 2303.
(*b*) 4 *Esp*. 168.
(*c*) 1 *Camp*. 94
(*d*) 16 *Ves*. 269.
(*e*) 17 *Ves*. 422.
(*g*) 2 *Russ*. 385.
(*h*) 2 *Russ*. 385.
(*i*) 17 *Ves*. 422.

At

At the conclusion of the Solicitor-General's reply,

*The* LORD CHANCELLOR said:

I am clearly of opinion that this is a case in which I ought not to exercise the jurisdiction of this Court, without giving the parties an opportunity of trying their rights at law; for, where any doubt exists as to the right of the parties, if the Court were to exercise jurisdiction without giving an opportunity of trial at law, there would be different law in this Court and in the courts of law upon the subject. The proceeding here is merely for the purpose of making effectual the legal right, as Lord *Eldon* says in *Wilkins* v. *Aikin.* (*a*) Where any doubt exists as to the legal right, it is very proper to be tried. The only question is, whether, in the meantime, the injunction is to be continued, or whether it is to be dissolved, on the undertaking, which the Defendant has offered, of keeping an account. It is obvious that it is the interest of both parties that the injunction should be dissolved, for if, in consequence of piracy, the Defendant is, in fact, selling the Plaintiff's work, the Plaintiff will have the profits of the publication; but if, on the contrary, no piracy has been committed, a very great hardship is inflicted upon the Defendant; and, on that supposition, he has already experienced a severe hardship, because the injunction has prevented the sale of his book during the season. If Mr. *Stuart* thinks it proper to press for the continuance of the injunction, I must look through the passages in the respective books.

Mr. *Stuart.*

We should not merely have the profits of the sale in the meantime, but we should be indemnified for the loss

(*a*) 17 *Ves.* 422.

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loss which we may sustain by reason of the sale of the Defendant's book preventing the sale of our book in the meantime. If the Master would estimate what loss we had sustained, I have no objection.

*The* LORD CHANCELLOR.

It appears to me that if you succeed, it should be referred to the Master to ascertain the amount of damage.

Mr. *Stuart.*

If the Master, in estimating the intermediate profits, gives us not only our share, but also compensation for the loss of the sale of our book, by reason of the sale of the Defendant's book, that would be fair.

*The* LORD CHANCELLOR.

If you agree that the injunction should be dissolved, and that the Defendant should sell his book, and that if you establish your right, it should be referred to the Master to ascertain what damage you have sustained, that will be a fair arrangement.

Mr. *Stuart* then stated that Mr. *Halcomb* had sold his copyright to some other persons who were also made Defendants on the record.

*The* LORD CHANCELLOR.

Then let the case stand till *Saturday.* As I take that view of the case, I abstain from saying anything more as to the law.

*The Solicitor-General.*

If the publishers (the other Defendants) agree to come into this arrangement, it can be settled now.

The

The case was ordered to stand over till the following *Saturday*.

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The reporters do not believe that the case was mentioned again until *Saturday* the 30th of *July*. On that day, Mr. *Elderton* appeared for the publishers, to whom it was stated that Mr. *Halcomb* had assigned his copyright. Mr. *Stuart* said that he did not object to the injunction being dissolved as against Mr. *Halcomb*; but that the other Defendants had not moved to dissolve it.

*The* LORD CHANCELLOR.

I can only make the order as to the party who applies. The injunction, in my opinion, ought not to stand: but the matter should be put in the course of legal inquiry.

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It was then arranged that the injunction should be simply dissolved, as against Mr. *Halcomb*, and that the costs of his application should be costs in the cause: and that the other Defendants should give notice for *Wednesday* next, for a motion to dissolve the injunction as against themselves.

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The reporters believe that the case was never mentioned again. The Plaintiff soon afterwards died.

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BETWEEN

*March* 28. JOHN THORPE, - - Plaintiff;

AND

WILLIAM HUGHES, JAMES DWYER, PHILIP JONES, JOHN ALEXANDER PALMER, HENRY WATSON, DESPARD TAYLOR, ARTHUR LLOYD SAUNDERS, JOHN CHAMBERS, DAVID HASTINGS M'ADAM, and WILLIAM HODGES, - Defendants.

A holder of shares in a joint stock banking company in *Ireland*, formed under the provisions of the 6 *G.* 4. *c.* 42., filed his bill in this court, on the 6th of *March* 1838, against certain persons as the directors, and against the public officer of the company, alleging that he had been induced to purchase the shares through the misrepresentations and fraud of the directors, and that, on the 19th of *January* 1838, they had commenced an action against him in the Court of Exchequer in *England*, in the name of the public officer, for the recovery of the instalments due on his shares, which action would come on for trial at the assizes to be holden at *Liverpool* on the 22d of *March* then instant, and praying a discovery and injunction, and that the moneys which he had previously paid for shares might be refunded. To this bill the public officer duly appeared; but on the 16th of *March* the common injunction was obtained against the other defendants for want of appearance. The Plaintiff then moved that the injunction might be extended to stay trial of the action commenced by the Defendants, the directors, in the name of the other Defendant; and, upon this motion, besides the usual affidavit of the Plaintiff, there were read an affidavit by the Plaintiff's attorney in the action, stating the delivery of the declaration, and certain proceedings which had subsequently taken place at law, with a view to explain the apparent delay in the institution of the suit; and also an affidavit by the Defendant, the public officer, setting forth the constitution of the company, and the frame and nature of the pleadings in the action.

THE bill was filed on the 6th of *March* 1838. It was extremely long and voluminous; but the case made by it, was, in substance, that, in the month of *December*

The Vice-Chancellor granted the motion; but his Honor's order was discharged upon appeal; the Lord Chancellor holding,

First, that the order was contrary to the practice and irregular in form, inasmuch as the common injunction had never been obtained against the public officer, the Plaintiff at law.

Secondly, that the order ought not to have been made, because it appeared, upon the whole case taken together, that the allegation in the Plaintiff's affidavit, that the discovery sought by his bill was material to his defence at law, could not be true in fact, and

*Semble*, Thirdly, that the delay between the time of the commencement of the action

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*December* 1834, a joint stock banking company, with a capital of five millions, to be held in *5l.* shares, was projected by the Defendant *Dwyer*, and was to be carried on according to the provisions of the 6 *G.* 4. *c.* 42., intituled "An Act for the better regulation of co-partnerships of certain bankers in *Ireland*," under the title of "The Agricultural and Commercial Bank of *Ireland*:" that several of the Defendants were active in getting up the project of the bank, and all of them, except *Hughes*, at that time or afterwards, took upon themselves to act as the directors or managing committee of the bank; and *Hughes* subsequently took upon himself to act as its secretary and public officer: that in the year 1834, several of the Defendants commenced a banking business in *Ireland* under the aforesaid title or firm, but were unsuccessful: that in the year 1835 the committee of the bank, being much in want of money for the purpose of carrying on the same, caused attempts to be made in *England* for raising further sums by sales of *25l.* shares: that one *Mitchell*, who was employed by them in *Manchester* to sell such shares, applied to the Plaintiff to become a purchaser: that *Mitchell* made divers communications to the Plaintiff respecting the state of the affairs of the bank, and also showed him several letters and prospectuses relating thereto: that such communications were made at the suggestion and with the knowledge and sanction of several of the Defendants, and particularly of *Dwyer*, who well knew the same to be untrue in many particulars; and that such representations were made with a view to deceive the Plaintiff and to defraud him of his money, by inducing him to purchase shares: that the Plaintiff, relying on the correctness of such representations, agreed or consented, at different times, to purchase 275 shares, and paid certain sums on account: that subsequently to the purchase of such shares the Plaintiff discovered

action and the institution of the suit was not sufficiently accounted for to justify the Court in extending the injunction so shortly before the trial.

In what cases and how far, upon such a motion, affidavits may be used, on behalf of the Plaintiff, to explain his apparent delay in instituting the suit, or on behalf of the Defendant, to state the nature and effect of the proceedings at law, for the purpose of showing that the discovery to be made by the answer would not be material to the defence at law, *quære*.

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discovered that the representations made to him were untrue, and that the accounts made out by or on behalf of the bank were fraudulent, and concealed the real state of its affairs, and the gross mismanagement of the committee; and that the same were so made out with a view to deceive and defraud the Plaintiff:

That the Plaintiff also subsequently discovered that the committee had done many acts without his knowledge or sanction, or that of the *English* subscribers, as required by the regulations of the bank; and that proceedings had been adopted which were a fraud upon the Plaintiff, and that the whole management, both prior and subsequently to the time when the Plaintiff became a shareholder, had been conducted on a system of fraud; and, in particular, that the balance sheet shewing the assets and liabilities of the bank in *October* 1836 was, if not wholly false, grossly exaggerated, and that the items composing it were not stated *bonâ fide*, especially in reference to the paid up capital:

That one *M'Kenzie* was employed by the committee as an accountant, and that he, having discovered errors in the accounts of the bank, was induced by the committee to make up a fraudulent and untrue statement of the accounts, and was indemnified by them for so doing; and that such statement was afterwards used by the committee for the purpose of preventing, and it did for some time prevent, inquiry into the state of the accounts: that the bank was in an insolvent state at the time when the Plaintiff was induced to become a purchaser of shares; but that the true situation of its affairs was fraudulently concealed from him, and that the bank was represented to him to be in a flourishing state at a time when it was all but insolvent:

That

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That on the 19th of *January* 1838, an action was brought in the Court of Exchequer in *England* against the Plaintiff, by the Defendants or some of them, in the name of the Defendant *Hughes*, as the secretary or public officer of the bank, to recover payment of the sum of 1500*l.*, on the pretence that such sum was due from the Plaintiff to the bank in respect of the second instalment of 5*l.* per cent. on 100 of the shares, and the first and second instalments of 5*l.* each on 100 other shares, and for some other sums alleged to be due for calls upon the shares which the Plaintiff had been induced to purchase through the misrepresentation and fraud of the Defendants; and that the Defendants threatened and intended to proceed to trial of the action at the assizes for the southern division of the county of *Lancaster*, to be holden at *Liverpool*, on the 22d of *March* then next; and that, if the Defendants would give a discovery as to the matters charged in the bill, it would appear that the Plaintiff ought not to be compelled to pay any part of the money for which the action was brought.

The bill prayed that the Defendants, and particularly the Defendant *Hughes*, might be restrained by injunction from prosecuting the action so commenced by him against the Plaintiff, and from commencing or carrying on any other action against him, for the recovery of the said sum of 1500*l.*; and might be decreed to repay the sums which the Plaintiff had paid in respect of the shares, and to indemnify the Plaintiff against such liabilities as he might have become subject to in consequence of his having been fraudulently induced to take such shares.

The Plaintiff, by an affidavit sworn on the same day on which the bill was filed, verified the material allegations in the bill, and further deposed that he was advised that he

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he could not make a proper defence to the action without the answer of the Defendants to his bill; and that the Defendants resided in *Ireland*, but that *Hughes*'s attorney in the action was *William Sharpe* of *Bedford Row*, &c.

The Vice-Chancellor made an order, grounded upon this affidavit, that service of the subpœnas on *Sharpe*, the attorney of *Hughes* in the action, should be good service upon all the Defendants. The Defendant *Hughes* entered an appearance; but, on the 16th of *March*, the common injunction issued against all the other Defendants, they being then in contempt for want of appearance(*a*); and a few days afterwards the Plaintiff applied for and obtained leave to give notice to *Hughes* of a motion to extend the injunction to stay trial.

In support of that motion (which was first made on the 20th of *March*, when no order was made upon it, and was afterwards renewed on the 27th) *Edward Bent*, the attorney employed by *Thorpe* to defend him in the action, made an affidavit, whereby he deposed, among other things, that the action mentioned in the bill was commenced on the 19th, and the declaration delivered on the 29th of *January* then last: that the Defendant thereupon made an application to the Court of Exchequer, that *Hughes* might be compelled to deliver better particulars of his demand, and give security for costs; and that such better particulars were not delivered till

(*a*) The order for the common injunction directed that an injunction should be awarded for stay of the proceedings at law of the Defendants, other than the Defendant *William Hughes*, touching any matters here in question, until such Defendants should appear to and fully answer the Plaintiff's bill, and the Court make other order to the contrary; but the said Defendants were in the mean time to be at liberty to call for a plea, and proceed to trial thereon; and for want of a plea to enter up judgment; but execution was thereby stayed.

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till about the 16th of *February*, and that the sum of 200*l.* was deposited by *Hughes* in Court, in lieu of security for costs, but not until the 10th of *February*. The affidavit then proceeded to state how the time which subsequently elapsed, prior to the filing of the bill, had been occupied, for the purpose of shewing that there had been no unnecessary delay in instituting the present suit.

The Plaintiff himself also made an affidavit stating that he was advised and believed he could not safely proceed to the trial of the action commenced against him by the Defendants, or some of them in the name of the Defendant *Hughes*, until the Defendants should have put in their answers in the suit; and that he expected and believed that the answers of the Defendants, or some of them, would contain a discovery which would be material and necessary to his defence to the action, and which would enable him to make a good defence.

The affidavit of the Defendant *Hughes*, filed in opposition to the motion, after stating the origin and formation of the Agricultural and Commercial Bank of *Ireland*, in pursuance of the provisions of the 6 *G.* 4. *c.* 42., and that the regulations of that act, with respect to its constitution and proceedings, and particularly with reference to the provision which required that all the banking establishments of the co-partnership should be at places distant more than fifty miles from *Dublin* (*a*), had been strictly complied with, and that the deponent and a person of the name of *Thomas Hodges* had been duly appointed public officers of the copartnership, prior to the 1st of *January* 1838, proceeded to state that, previously thereto, the Plaintiff *Thorpe*

(*a*) Section 2.

affidavit of *William Hughes* read, and what was alleged by counsel on both sides, this Court doth order that the injunction issued in this cause do extend to stay the trial of the action commenced by the Defendants, *J. Dwyer*, *P. Jones*, *J. A. Palmer*, *H. Watson*, *D. Taylor*, *A. L. Saunders*, *J. Chambers*, *D. H. M'Adam*, and *W. Hodges*, in the name of the Defendant *W. Hughes*, against the Plaintiff, as in the Plaintiff's bill stated."

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The Defendant *Hughes* now moved to discharge the last-mentioned order.

Mr. *Wakefield* and Mr. *Sharpe*, in support of the motion.

This motion raises a very important question with reference to the construction of the act for regulating joint-stock banks. The Defendants to the bill are the public officer of a joint-stock bank in *Ireland* (the party who now makes the motion and who is the nominal Plaintiff in the action) and nine other individuals, who are joined as Defendants with him, upon an allegation that they form the managing committee of the bank. As soon as the bill was on the file, the Vice-Chancellor, upon an affidavit stating that all the parties were resident out of the jurisdiction, and that the nine last-named Defendants had commenced an action against the Plaintiff in the name of their co-defendant *Hughes*, and that *William Sharpe* was the attorney of *Hughes*, in the action, made an order directing that service of the subpœnas upon *Sharpe* should be good service against all the Defendants. *Sharpe* was the attorney of *Hughes* only, and had no authority to act for the others. The consequence was, that no appearance was entered for them; and at the end of the eight days they were in contempt for want of appearance, and the common injunction issued

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against them. Then followed the application to extend the injunction to stay trial, which the Vice-Chancellor granted, and which it is the object of the present motion to discharge.

Under the new rules of pleading at law, the general issue is a mere denial of the contract — it only goes to the fact of the promise or implied promise; and the question of fraud cannot be raised under that plea, but must be specially pleaded; *Tidd's New Practice.* (*a*) By his bill the Plaintiff does not make the slightest reference to any one of the three points upon which, by his pleas, he relies as his defence at law. He does not raise a question as to any promise: neither does he allege that the debt has been paid; or that the bank has establishments within fifty miles of *Dublin;* in short, the whole of the case made by the bill is, for the purpose of defence to the action, wholly irrelevant; and Lord *Eldon* has laid it down, that where, as in this case, the disclosure cannot possibly be material in aid of the defence, the Court, notwithstanding the Plaintiff's affidavit, will not extend the injunction; *White* v. *Steinwacks.* (*b*) But the singularity of the case is this, that whereas the injunction goes to restrain the other Defendants, who are in contempt, from all proceedings at law in the name of the Defendant *Hughes*, the latter is himself not affected by that injunction; and the action which he has brought is brought in his name by the copartnership, which copartnership, as appears from his affidavit, consists of 3000 shareholders. In *Montague* v. *Hill* (*c*) and *Lord Portarlington* v. *Graham* (*d*), where a somewhat similar question arose, the action was considered and treated as the

(*a*) P. 350. 5 *B. & Adol.* App. viii.

(*b*) 19 *Ves.* 83.

(*c*) 4 *Russ.* 128.

(*d*) 5 *Sim.* 416.

the action of the assignee, though brought in the name of the assignor: yet even there the Court held that, the assignee not being in contempt, there could be no injunction against him. *Hughes*, however, is not the assignee of his co-defendants, some of whom are sworn to be not even shareholders. The injunction originally granted was the common injunction to stay actions generally, and not to stay an action brought by the nine in the name of *Hughes;* and then, under pretence of extending that injunction, an order has been made to stay the trial of an action brought in the name of *Hughes;* in other words, extending the injunction to a purpose to which it had no application originally. That is a mere abuse and perversion of the term "extending," and is wholly irregular. No instance has occurred of an injunction, granted against several Defendants, being extended to stay the trial of an action not commenced by them, but by the public officer or managing directors of a copartnership of which they are members.

By the 6 *G.* 4. *c.* 42. *s.* 6., the public officer of the bank must be himself a member of the company; and it is clear, from the other sections, and especially the 10th and 14th, that, upon the true construction of that act, nobody can be made a Defendant to a suit against the company except the public officer. At all events, the act of parliament either operates to prevent any bill in equity or action at law against any one but the public officer, or it must leave the parties at liberty to proceed as if the act of parliament were not in existence. It is impossible to take a middle course, as has been attempted here, and file a bill both against the public officer and against certain individual members of the company. Such a bill would be defective for want of parties, unless all the shareholders were joined as Defendants. The case is treated throughout as one of personal fraud on the

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part of the nine last named Defendants, from the consequences of which the Plaintiff is entitled to be relieved. The Plaintiff treats the nine as individually liable, and not the company. The course adopted here, if sanctioned by the Court, will furnish to every debtor of a copartnership of this kind an easy means of defeating any action by which the copartnership may seek to recover payment of their debts.

The order is irregular, on another ground. The Defendant had previously referred the bill for impertinence; but *Neale* v. *Wadeson* (*a*) and *Davenport* v. *Davenport* (*b*), are authorities to shew that, pending a reference for impertinence, an injunction cannot be extended. The Plaintiff has also been guilty of great delay in applying for equitable relief to this Court, after the declaration in the action had made him fully acquainted with the nature of the company's demand.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Bagshawe*, *contrà*.

The question here goes a great deal farther than the case of an assignee suing at law in the name of his assignor, and a great deal farther than any thing that was decided in *Montague* v. *Hill* or *Lord Portarlington* v. *Graham*. It rather resembles the form of proceeding in actions of ejectment, where several parties bring their actions in the name of *John Doe*, or some other nominal Plaintiff. There the common injunction would be granted against the lessor of the Plaintiff, and would stop his action until all the parties had put in their answers. The act of parliament declares that in any action judgment shall be entered up against the public officer, and execution shall be levied upon any of the members of the company. This,

(*a*) 1 *Bro. C. C.* 574., and 1 *Cox*, 104. (*b*) 6 *Mad.* 251.

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This, too, it is to be observed, is an act of parliament which gives to a company, consisting of 3000 shareholders, the privilege of being treated and suing as if they were one individual; and *Hughes* describes himself as being the public officer of the company. The act of parliament has no negative words, and the company must take the privilege for better and for worse. The act has not relieved the shareholders from the ordinary law of partnership, according to which, the declarations or admissions of any one of the 3000 would be good evidence in this action against the whole body. There would be no means of obtaining any admissions or useful discovery from the public officer, who, being a mere servant, probably knows nothing. The case made by the bill is that this is a mere bubble company, and the answers of the managing committee may and probably will furnish most material admissions to establish that case.

*The* LORD CHANCELLOR.

If this be an order for a special injunction, then it is wholly contrary to the practice: it is the very order which in *Lord Portarlington* v. *Graham* the Vice-Chancellor refused to make. The rule of the Court is a universal rule, that you cannot restrain proceedings at law except upon the Defendant's default. Here there is no default either in *Hughes* or the company. *Hughes* is the Plaintiff at law; but how does the Court know any thing except upon affidavit (and the introduction of the affidavit makes it a special injunction), as to the connection between *Hughes* and the other Defendants?

Mr. *Jacob*.

The Vice-Chancellor considered the action as the action of all the parties who are the real Plaintiffs in it, and therefore made an order that service upon the

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attorney of *Hughes* should be good service upon them all; treating it as the action of the whole body, and holding that the Plaintiff had the same right against them to get the action stayed until they had all put in their answers. *Hughes* cannot be in a better situation than *Dwyer*, and the others whom he represents. This is, in fact, the common case of an action brought by several persons, some of whom are in default and others not. It is the action of a great number of shareholders in copartnership, including these Defendants, who have the privilege of using the name of a particular individual as their Plaintiff for the purposes of the action; but it is in substance the action of them all, and if some are in default, the action must be stayed till all have answered. The act of parliament cannot have taken away the right of suing the individual members of the copartnership, nor do the further rights or remedies thereby given exclude all resort to the old law. Suppose there was a company of ten partners, and that nine of them, the acting partners, had committed a fraud upon me; in respect of which I had an equitable defence against a demand of the company for which they were suing me at law; if I were to file a bill against all the partners, and get the common injunction against the nine, on their default, could the tenth come in and say, that because he was in no default, the injunction should be dissolved? That is, substantially, the present case; for all these Defendants are bound up together in the fraudulent transaction, and are equally interested in the action brought in the name of *Hughes*. All that in *Lord Portarlington* v. *Graham* the Vice-Chancellor meant to say was, that a party seeking to restrain proceedings at law must first get the common injunction. If that was not his Honor's meaning, the most mischievous consequences might follow in the case of assignor and assignee, and a wide door be opened to collusion and fraud.

fraud. The assignor would only have to go abroad, leaving the assignee (who of course could safely put in an answer denying all knowledge) to bring his action in the assignor's name. In the case of the assignment of a bond, the assignee is not the Plaintiff at law, whereas here the public officer represents the other Defendants. How are such cases to be dealt with, if actions brought by parties who stand in this situation cannot be reached by injunction? The Vice-Chancellor only said to the Defendants that they were not to prosecute the action which they were then prosecuting in the name of another person. The injunction is only so far special, that an affidavit is required to connect one party with the other. The case of *Lord Portarlington* v. *Graham* ultimately came before Lord *Brougham*, who continued the injunction, upon the terms of the Plaintiff paying the money into Court.

The reference for impertinence does not affect the other Defendants who are not parties to that reference, and against whom the injunction is now sought to be extended. The affidavit of the Plaintiff's attorney fully explains any apparent delay on the Plaintiff's part in following up his remedy in this Court.

Mr. *Wakefield*, in reply.

*The* LORD CHANCELLOR.

If it should be found that the parties against whom actions are brought under the authority of the act of parliament by officers of these companies, require some protection which the present practice of the Court does not afford, the Court will be able to adapt its practice to meet that new case; but this is not the mode in which that object can be attained.

In

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In considering how a Defendant, sued at law by a copartnership of this description, may receive that protection which the practice of a Court of Equity gives to ordinary persons who are so sued, and in laying down any rule or establishing any practice for the purpose of giving that protection, the Court must be careful to see that it does not entirely defeat the object of the act of parliament. The object of the act of parliament was to promote these companies, consisting of a large number of persons, associated together for the purpose of carrying on great undertakings. Such associations, however, were found to be extremely inconvenient with reference to legal proceedings instituted on behalf of the company, and still more inconvenient to those with whom the company were dealing, and who, according to the rule of the Court, were under the necessity of making all the individual members parties; a rule which resulted in defeating the ends of justice in a great variety of cases. The legislature, therefore, has enacted that a company of this kind, upon going through a certain prescribed form, shall be at liberty to sue and be sued by an officer nominated for that purpose. (*a*)

If I were to sanction what the Vice-Chancellor's order has done, I should establish a practice which would effectually prevent any of these copartnerships from ever bringing an action against any one who was desirous of avoiding the consequences of that action.

Take this very case — Here is a joint-stock company consisting of 3000, or at least of a great number of persons, associated together as copartners. It is found necessary to

(*a*) In addition to the 6 *G.* 4. *c.* 42. see also the 7 *G.* 4. *c.* 46. and the 7 *Will.* 4. & 1 *Vict. c.* 73.

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to bring an action on behalf of the company: the action is brought; the particular defendant in that action files his bill against the officer representing the company, and any other person whom he chooses to select out of the 3000 shareholders, or against any person who may have no interest at all, but whom he thinks proper to allege to be a shareholder, or to be a person having connection with the company; and the whole proceedings on the part of the company are to stop, because the persons so selected put themselves in the situation of having an injunction granted against them. What protection have the company against it? If their proceedings are to be stopped by the default or misconduct of any person so selected by the individual whom they are suing at law, what means have they of prosecuting their claim, and of doing that which the legislature has said they should have the privilege of doing; namely, asserting their rights by an action to be brought in the name of their officer? It is clear that that course would be always resorted to by a dishonest defendant, and would effectually prevent any proceeding on the part of the company.

In this case what has been the course taken? — I am not considering the propriety of the order substituting service on the attorney of Mr. *Hughes*, the Plaintiff in the action, for the purpose of bringing before the Court the other nine Defendants. — For the present purpose I will assume that to be right, because it is not complained of. Against *Hughes* there is no injunction — for what reason it is not now material to consider — but there is no injunction against him; and he is the Plaintiff at law. Whether he is Plaintiff at law under the circumstances stated by the bill, is a matter which can only be ascertained by affidavit, for the bill cannot be taken to be true. The fact is, that an action is brought in the name

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name of *Hughes*, who is one of the Defendants upon this record; the other Defendants do not appear, and, on their default, the common injunction was issued; it was issued in the ordinary way, not upon any special order, but in the only way in which the common injunction can issue, namely, upon the default of the party against whom it issues. Of course it issues on the default of a particular set of Defendants, or the particular Defendants; it issues as to them, and as to their proceedings; and the effect is, that it will restrain an action brought by the person against whom it issues; but it will not restrain any action except the action brought by the person against whom it is issued. Here, however, there is no action in which these nine Defendants, or any of them, are Plaintiffs. There is an action in which *Hughes*, who is not in default, and against whom no injunction has issued, is Plaintiff: and then an application is made, not in form, for a special injunction against *Hughes*, making out a special case—that although he is the nominal Plaintiff at law, he is, in fact, suing on behalf of the other nine Defendants—but an application is made to extend the injunction already issued to prevent the proceedings at law by these nine other Defendants, not including *Hughes*. As against them it would be useless, because no action had been brought by them, and therefore, the commencement of an action would be restrained: but it would be the ordinary course, if there had been any action brought by them, that, on the usual affidavit for the purpose of extending the injunction to stay trial, the injunction should be so extended; and if the Plaintiff had thought proper to obtain that injunction, no objection could be made at all on behalf of *Hughes*. But, under the appearance of an order made on an application to extend the injunction, that is, to extend an injunction already granted, so as to restrain the trial of an action supposed to be pending,

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an order is made, which is, to all intents and purposes, an order on a special application against *Hughes*, to stay the action which he had brought. Now, that is met at once by Lord *Portarlington*'s Case. (*a*) There, the Vice-Chancellor said no such thing could be done. It is not supported by *Montague* v. *Hill*. (*b*) There, the common injunction had issued against the Plaintiff at law, and both parties put in their answers, and the application was to get rid of that common injunction.

I do not say that a special application may not be necessary to establish some new rule, if the ordinary practice, which has hitherto existed, should not be sufficient to meet the case which may possibly be produced by some of these proceedings, on behalf of or against joint-stock companies of this kind; but it is not suggested that any such authority is now to be found in the books, and the case of Lord *Portarlington* is a direct authority to the contrary. But that which in my mind is fatal to this order is, that it is not what it purports to be. It is a special injunction obtained against a party not in default; a party against whom not the common injunction has been obtained, but a special injunction, to restrain him from proceeding to trial. That is contrary to the settled practice of this Court; and if the Court is to introduce a new practice for the purpose of meeting this new case, it must be a practice adapted to the case, and which is not open to the great danger which might arise, if a proceeding of this sort were to be adopted and sanctioned by the Court. I do not find it necessary now to lay down any rule for the future: I have only to preserve the old practice.

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(*a*) 5 *Sim.* 416. (*b*) 4 *Russ.* 128.

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It is some satisfaction to think that the parties cannot sustain any injury by my setting aside this order; for it is impossible that the issues tendered at law can be affected by what is asked for by this bill. The issues are quite collateral to it. The Plaintiff may be quite right and able to make out his case; but the discovery relative to those matters which are matters of alleged fraud cannot aid him on the trial of the issues. It struck me at first that, on the first issue, the fraud *might* be given in evidence on the part of the Defendant. So it would have been until the practice was altered by the new rules; but it is quite obvious that now cannot be so. (*a*) On the first issue the question will be *assumpsit* or *non assumpsit*. The Defendant at law and Plaintiff here comes and alleges his legal liability, and seeks to be relieved from the payment of that debt. The second issue, *payment or no payment*, is also one which would not be at all affected by any discovery which might appear on the face of the records of the Court. He alleges just the reverse in equity of that which he alleges at law; and it is a point, at all events, which cannot be affected by the discovery of the alleged fraud. As to the last, it is not a matter which is at all put in issue upon these pleadings.

Upon

(*a*) "In every species of *assumpsit* all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.* Infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded." — *Reg. Gen. Hil. T.* 4 *Will.* 4. tit. *Pleadings in Particular Actions*, I. *Assumpsit*, s. 5.

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Upon that ground alone, independently of the question of practice, I should have thought that this was not a case in which the Plaintiff was entitled to sustain the order, it being an order to restrain the trial of an action in which the discovery sought in equity could not possibly affect the issue to be tried. For, although the Court gives credit to the Plaintiff's affidavit, yet if it does appear, upon the whole matter taken together, that the ordinary allegation that the matters sought to be discovered by the bill would be a material defence to the action, cannot possibly be true in fact, it is a ground on which the Court will refuse to extend the injunction to stay trial. (*a*)

With respect to the time that has elapsed, regard must be had not merely to the difficulty under which the Plaintiff may have been placed, but to the difficulty to which he exposes the Defendant, by not bringing his case forward sooner. On the 29th of *January* the declaration is filed: he is then apprised that there was an action brought against him to make him pay his instalments growing out of his character as a partner in this company: he does not file his bill till the 6th of *March*, although he was probably not much in the dark when he was served with the writ on the 19th of *January*: at

(*a*) It might seem, therefore, that, for the purpose of judging whether the discovery sought by the bill would be material to the defence at law, the Court is not confined to the statement of the proceedings at law which the bill makes, but may be informed by the affidavit of the defendant in equity what the issues tendered at law are. See, however, *White* v. *Steinwacks*, 19 *Ves.* 83.; *Barrett* v. *Tickell*, *Jac.* 154. It is also to be observed that, in the principal case, the order sought to be discharged recited, and was grounded on, the affidavit of the Defendant *Hughes*, as well as the affidavits of the Plaintiff and his attorney, so that the Plaintiff's counsel could not object to the Defendant *Hughes*'s affidavit being read.

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at all events, when he saw the declaration on the 29th of that month, he was fully apprised of the case the Plaintiffs in that action had to make; and yet until the 6th of *March* he does not file his bill. With respect to his proceedings since, I do not know that any great delay is to be imputed to him. He could not get the common injunction till the party was in default on the 14th of that month: the subsequent proceedings have not been very rapid; but the delay is not so material as the delay between the 29th of *January* and the 6th of *March*, when the bill was put upon the file. All this runs the time very close to the trial; and then he comes, just on the eve of the trial, not making the application till the 24th of *March* (*a*), two days after the commission day in the county in which the action is to be tried. The Court always looks very anxiously to see how the delay is accounted for, when the Plaintiff comes to ask for an injunction to stay trial on the eve of the trial, and when, if the injunction is to be granted, it cannot be granted without putting the other party to great inconvenience and expense. (*b*)

All these reasons concur in leaving no doubt on my mind that this order cannot be supported.

(*a*) This was the day on which notice of the renewed motion to extend the injunction was given.

(*b*) *Field* v. *Beaumont*, 3 *Madd.* 102. 1 *Swan.* 204.; and see *Brown* v. *Newall*, 2 *Mylne & Craig*, 558.; see pp. 569, 570.

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## BICKHAM *v.* CRUTTWELL.

*April* 23, 24.

THE will of *Richard Bowsher*, late of the city of *Bath*, solicitor, which bore date the 4th of *July* 1834, and was duly executed and attested to pass freehold estate by devise, was in part as follows: — "I give, devise, and bequeath my estate, fee-farm rents and premises, called *Kensington Place*, and all my estate, right, title and interest therein, (subject to the annual payment of 105*l.* thereout by quarterly payments, settled by me thereout, in trust for the payment of the *Highbury* Charity, and of an original rent of 57*l.* 10*s.* per annum, payable to the representatives of the original ground landlord of one third part thereof,) my three houses in *Norfolk Crescent*, called *Norfolk House*, and Nos. 1. and 3., my house, No. 17. *Great Stanhope Street*, and my two houses Nos. 11. and 12. *Kensington Place;* the whole subject to the payment of the mortgage debt of 2900*l.* (borrowed on mortgage of the houses in *Norfolk Crescent* by *Richard Orchard*, of whom I purchased the same), to the representatives of the late Archdeacon *Willes*, or such part thereof as shall remain undischarged at my decease, and subject likewise to the annual ground rents reserved and made issuing and payable to me out of the said several messuages, unto *Charles Currie Bickham* effects whatsoever, subject nevertheless, as to his personal estate, to the payment of his debts, except such debts as were therein excepted therefrom, to trustees, in trust as to the particular estates therein specified; and, among others, as to his four messuages therein described, subject to the mortgages made on the same, and from the payment of which he thereby exempted his personal estate; and as to all the residue and remainder of his said real and personal estates, in trust for the persons therein mentioned:

A testator, who was possessed of considerable real estate, comprising, among other property, three houses in *N.*, upon which he owed a sum of 2900*l.* secured by mortgage, devised his three houses in *N.*, together with several other houses therein described, "the whole subject to the payment of the mortgage debt of 2900*l.* borrowed on mortgage of the houses in *N.*," to *C.* and *H.* in fee. He then devised and bequeathed the residue of his real estates and all his personal estate and

Held, that the testator's personal estate was the primary fund for the payment of the mortgage debt of 2900*l.*

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*ham* and *Harriet* his sister, and their heirs, as tenants in common. And as to all the rest, residue, and remainder of my real estates, and as to all my personal estate and effects whatsoever, I give, devise, and bequeath the same, subject nevertheless, as to my personal estate, to the payment of my just debts, funeral and testamentary expenses, except such debts as are herein excepted therefrom, and the expenses attending the trusts hereof, unto *John Routh* the elder, *Thomas Macauley Cruttwell*, and the said *Charles Currie Bickham*, their heirs, executors, administrators, and assigns, upon the trusts, and to and for the intents and purposes hereinafter declared concerning the same; that is to say," &c. The testator then proceeded to enumerate and describe the several messuages and parcels of which the residue of his real estate consisted — one portion of which he mentioned as follows: — "And also my four messuages Nos. 3. 4. 5. and 6. in *Nelson Place* aforesaid, subject to the mortgages made on the said last-mentioned messuages, or such part or parts thereof as may remain unpaid at my decease, and from the payment of which said mortgages I hereby exempt my personal estate, and also subject to the payment of the several yearly fee-farm rents, made issuing and payable thereout, in trust as therein mentioned." And all the rest, residue, and remainder of his said real and personal estates, subject as aforesaid, the testator gave in trust for *Ann Routh*, wife of the said *John Routh* the elder, for her separate use for life; and, after her decease, in trust for the said *John Routh* the elder, for his life, with remainder among their children as therein mentioned.

The bill was filed by *Charles C. Bickham*, to whom the moiety of the houses in *Kensington Place*, *Norfolk Crescent*, and *Great Stanhope Street*, specifically devised

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devised to his sister *Harriet*, had been previously conveyed by her, against his co-executors and co-trustees, and also against the persons beneficially interested in the testator's residuary estate. It prayed a declaration that the testator's personal estate, not specifically bequeathed, was liable to pay the mortgage debt of 2900*l.* in exoneration of the three houses in *Norfolk Crescent*.

The answer of the Defendants, the executors, admitted that the testator's personal estate not specifically bequeathed was more than sufficient to satisfy the amount of his funeral and testamentary expenses and all his debts.

The evidence in the cause proved that the testator, being seised in fee of the land on part of which *Norfolk Crescent* was afterwards erected, formed the design of laying out a portion of such land for building, and that he accordingly, under the superintendence of *Richard Orchard*, who was an operative builder not possessed of any property of his own, built, on speculation, at his own cost, the corner house (subsequently called *Norfolk House*), and also Nos. 1. and 3. in *Norfolk Crescent*, and agreed to grant and convey to *Orchard* the plots of ground and the houses erected thereupon, at certain yearly fee-farm rents, and subject to certain conditions and reservations; but in such manner that *Orchard* was to be merely a trustee for the testator, and upon a verbal understanding that the testator was eventually to pay to *Orchard*, as a remuneration for his trouble, a moiety of whatever profit might be realised on a sale of the houses; that, in consequence of this agreement and understanding, the testator, by an indenture bearing date in *March* 1808, conveyed to *Orchard* the plot of ground and premises comprising No. 3. in *Norfolk*

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*Crescent*, subject to the ground-rents and covenants mentioned in the deed; and that *Orchard* shortly afterwards, at the request of *Bowsher*, mortgaged the same premises to Archdeacon *Willes*, to secure 900*l.* and interest: that, in further execution of their design, *Bowsher*, by indenture bearing date in *May* 1812, conveyed to *Orchard* the plot of ground and premises comprising the corner house and also No. 1. in *Norfolk Crescent*, subject to the yearly ground-rents and the covenants therein mentioned; and that *Orchard* thereupon, at the request of *Bowsher*, executed a mortgage of the last-mentioned premises to Archdeacon *Willes*, for securing 2000*l.*, and interest: that, notwithstanding such respective conveyances, *Bowsher* ever after remained in receipt of the rents and profits of the said several premises, as the owner thereof, and paid all interest money which became due on the mortgages: that it having been ascertained, upon an investigation of the cost of the said several houses, and of the ground-rents, interest, and outgoings paid by *Bowsher* in respect of them, and upon a valuation of the premises, that *Bowsher* was likely to be a considerable loser by the building speculation, *Orchard* relinquished all prospect of any profit to be derived therefrom, and, in pursuance of the trust reposed in him, agreed to convey, and accordingly, in the month of *February* 1820, actually conveyed the whole of the property, described in the will as the testator's three houses in *Norfolk Crescent* called *Norfolk House* and Nos. 1. and 3., to a trustee for *Bowsher*, and his heirs, subject to the two mortgages for 900*l.* and 2000*l.*; and that *Bowsher* continued from thenceforward to the time of his death to hold the houses in question under that conveyance.

The cause now came on to be heard.

The

The *Solicitor-General*, Mr. *Willcock*, and Mr. *T. Platt*, for the Plaintiff, contended, that although the whole property comprised in the devise to the Plaintiff and his sister was charged with the mortgage debt, the personal estate, which was the natural and primary fund, was not exonerated from the obligation to discharge the burthen; and they cited *Serle* v. *St. Eloy* (*a*), *Galton* v. *Hancock* (*b*), *Tait* v. *Lord Northwick* (*c*), *Watson* v. *Brickwood.* (*d*)

Mr. *Tinney* and Mr. *Piggott*, for *John Routh*, the elder, and the other parties beneficially interested in the residuary estate, insisted that the testator, by extending the security so as to include the additional property comprised in the devise to the Plaintiff and his sister, had shown a clear intention to exonerate the personal estate altogether; and they relied strongly upon *Hancox* v. *Abbey*, which was, they contended, the case of a specific devise, subject, like the devise in the present case, to the payment of a particular debt, such payment being the condition of the gift. (*e*) They also referred to *Burton* v. *Knowlton* (*g*), *Tower* v. *Lord Rous* (*h*), *Bootle* v. *Blundell* (*i*), *Greene* v. *Greene* (*k*), *Clutterbuck* v. *Clutterbuck.* (*l*) They submitted, moreover, that, except in the case of a clear mistake of figures, it was not competent to a devisee to dispute the recitals contained in the devise under which he took; *Robinson* v. *Bransby.* (*m*) Here the testator had described himself as having purchased the property in question, subject to the mortgage: and it was a well settled principle, that, in such a case, unless the mortgage

(*a*) 2 *P. Wms.* 386.
(*b*) 2 *Atk.* 430.
(*c*) 4 *Ves.* 816.
(*d*) 9 *Ves.* 447.
(*e*) 11 *Ves.* 179.
(*g*) 3 *Ves.* 107.
(*h*) 18 *Ves.* 132.
(*i*) 19 *Ves.* 494.
(*k*) 4 *Mad.* 148.
(*l*) 1 *Mylne & Keen*, 15.
(*m*) 6 *Mad.* 348.

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mortgage money formed part of the consideration for the estate, or the purchaser, by communication with the mortgagee, distinctly took the debt upon himself, the mortgage would, as between his heir and executor, be considered as a charge upon the land, and his personal estate, therefore, would be only an auxiliary fund for the payment of it; *Waring* v. *Ward* (*a*), *Sugden's Law of Vendors and Purchasers.* (*b*)

Mr. *Barlow*, for *Cruttwell*, the other executor.

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*April* 24. *The* LORD CHANCELLOR entered into an elaborate and minute examination of the history of the transactions between *Orchard* and *Bowsher*, and then continued as follows: —

The result of this examination is to leave no doubt in my mind, that the whole of this debt was really the debt of *Bowsher*; that he was the person who owed the money, although, as between himself and the mortgagee, he did not appear as the party who contracted the debt. It comes, however, to much the same thing; for if a man borrows money in the name of a trustee, the debt is, in one way or other, his from the commencement, either to the person who advances the money, or to the trustee in whose name it is borrowed.

If then, the fact has been clearly made out in evidence, as I think it has, that this debt of 2900*l.* was the debt of the testator, the question of law is a matter of little or no difficulty. The testator, in connection with these three houses in *Norfolk Crescent*, gives certain other

(*a*) 5 *Ves.* 670. 7 *Ves.* 332. (*b*) Vol. i. p. 188. 9th ed.

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other property, and he devises the whole to the Plaintiff and his sister, subject to the payment of the mortgage debt of 2900*l.* to the representatives of Archdeacon *Willes*. He then gives the residue of his real estates, and all his personal estate and effects whatsoever, subject nevertheless, as to his personal estate, to the payment of his just debts, funeral and testamentary expenses, except such debts as are therein excepted therefrom, to his trustees, upon the trusts therein declared; and, in another part of his will, he gives his four messuages in *Nelson Place*, described as subject to certain mortgages thereon, from the payment of which mortgages he thereby exempts his personal estate. So that the testator, in effect, gives certain specified premises, subject to one mortgage, without any direction that they shall bear the mortgage, and he gives other mortgaged premises, with an express direction that the personal estate shall not be called upon to pay them. The gift of the residue of his personal estate, subject to the payment of his debts, except such debts as are therein excepted, amounts to a declaration that the personal estate shall bear all such debts as are not specifically excepted. His attention, too, was particularly called to mortgage debts.

Now what is there to be found on the face of this will referable to the particular houses in question? The gift is of the houses, subject to the payment of the mortgage. That expression however, it is clear, will not exonerate the personal estate; it is merely a description of the state of the property, and it has often been decided that such a form of expression does not amount to an exoneration of the personal estate. It is true, the devise subject to the charge also includes other property; that is to say, it charges other property which was not before subject to the mortgage debt. But that circumstance will not,

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of itself, exonerate the personal estate; it is merely an additional charge, giving a further security beyond what the mortgagee previously had. Why the testator should have so done does not appear. Very possibly he may have conceived, if we are to speculate on his motives, that by making the devise in this way he was exonerating the personal estate; but it is decided that the throwing in an additional security, where nothing but a mere charge is created, has no such effect.

It was supposed, indeed, that *Hancox* v. *Abbey* (*a*) was an authority to the contrary. The circumstances of that case, however, were extremely different, and, whether rightly decided or not, it does not touch the present question. That was not a devise of property subject to a mortgage; it was a devise of property upon trust to sell and pay a mortgage; and there was no gift of the estate until after the debt was paid off. Who, in that case, could take the estate, if it was not sold? Surely the devisee could not take it, and have the mortgage debt paid out of the personal estate. Sir *William Grant*, undoubtedly, in his judgment, makes a distinction between a general and a particular charge; but his observations must be understood with reference to the facts of the case before him, and not to any general principle.

Certainly, when that passage in this will was first called to my attention, I felt, as I still feel, a difficulty in discovering the motive which actuated the testator in charging these additional houses in aid of the original security. We know that the three houses had become of much less value. It may have been that the testator was desirous of protecting the lender from the consequences of the depreciation; or it may have arisen from a notion floating in his mind, that his personal estate

(*a*) 11 *Ves.* 179.

estate would not be liable to the payment of the mortgage money. But this is mere speculation; and although certainly the rule has been much relaxed, the burthen of shewing from the will itself that the ordinary administration of the assets is intended to be altered, still remains upon the party who seeks to relax it. The Court must be clearly satisfied by that which the testator himself has said, that it was his intention to exonerate the personal estate.

Now, upon the face of this instrument, although there is great difficulty in reconciling this particular clause with the rest of the will, so far from finding it to be manifest that the testator intended to exonerate the personal estate from the burthen of this mortgage debt, I find that which amounts to a plain declaration to the contrary. For I cannot possibly reconcile such an intention with the declaration that his personal estate is to be subject to the payment of his just debts, except such as are specially excepted therefrom.

It was argued, on behalf of the Defendants, that, by describing the debt as money borrowed on mortgage of the houses by *Orchard*, of whom he purchased the same, the testator has himself told us that he did not consider it as his own debt, and therefore that it was not necessary for him to except it. This mode of expression, however, as I observed when going through the history of the transaction, is not at all inconsistent with the circumstances of the case, or with the notion that the debt was really the testator's debt, and was so treated and considered by himself; and the word "purchased," though perhaps not quite accurate in fact, correctly enough describes the form which the transaction assumed.

We

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We must presume that the testator was cognizant of the rule of law; and if he knew the law at all, he must have known that he could not exonerate the personal estate from the burthen of his debts, unless he so expressed himself as to lead the Court to the fair conclusion, from the language which he used, that such was the intention which he meant to express.

I am quite satisfied that the debt in question was the testator's debt; and if it was his debt, he must have known, or be presumed to have known, that his personal estate could only be relieved from it by an express declaration, or by words raising a necessary inference to that effect. He has not so done with respect to this debt — he has done so with respect to other mortgage debts, and therefore I think that the ordinary rule must prevail. (*a*)

(*a*) See *Noel* v. *Lord Henley*, 7 *Price*, 241. & 1 *Dan.* 211.

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Sir THOMAS STANLEY MASSEY STANLEY, Bart. *v.* The CHESTER and BIRKENHEAD Railway Company.

*June* 23.

The *B.* and *C.* Railway Company agree with the Plaintiff to give him, for fourteen acres of land, 20,000*l.*, to be paid by instalments; other parties, called the *C.* and *B.* Railway Company, at the same time start a rival line, and both companies go to Parliament. In committee it is agreed that the merits of both lines shall be referred to two members of the committee, and the solicitors for the rival companies at the same time sign an agreement, by which it is stipulated, that the adopted company shall take the engagements with landholders, into which the rejected company may have entered; and to this agreement the sanction of two members of each company, and also of the Plaintiff, is subsequently obtained, and is signified by a written memorandum of approval. The *C.* and *B.* company is adopted, and is incorporated by Act of Parliament. Their line will require sixteen acres of the Plaintiff's land in a different place. The Plaintiff files a bill against the *C.* and *B.* company, stating these facts, and seeking to compel them to keep the agreement entered into by him with the *B.* and *C.* company; and to restrain the *C.* and *B.* company from entering upon any lands belonging to him, till after payment of the first instalment, which is already due; and from proceeding, after subsequent instalments become due, till such instalments shall have been paid. The Defendants demur generally to the bill. Demurrer over-ruled.

THE bill, which was filed on the 12th of *May* 1838, stated, that in the latter part of the year 1836, certain persons were preparing to form a company to make a railroad from *Chester* to *Birkenhead*, and were intending to apply for an act of parliament to enable them so to do, and that they proposed to call themselves "The *Chester* Junction Railway Company," but afterwards altered their name to that of "The *Birkenhead* and *Chester* Railway Company:"

That the line of railway proposed to be formed by the intended company was to pass through certain parts of the Plaintiff's estates, and would have been injurious to, and destructive of, his property; and that he was therefore, in the first instance, much opposed to the formation of that railway:

That *William Spurstow Miller*, in the character of solicitor for the promoters of the intended railway, made overtures

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overtures to the Plaintiff for his consent, and that, after some negotiation, the Plaintiff undertook to give his consent to the company for the proposed line of railway, and to permit them to form the same through his estates, on terms to be fixed by the agents of the Plaintiff and of the intended company: and that, in settling such terms, *W. S. Miller* was appointed to act for the intended company, and *Richard Blundell* for the Plaintiff: That *Miller* and *Blundell* accordingly met, and on the 17th of *January* 1837 signed a memorandum, which was set out in the bill, and which, after certain recitals, was couched in the following terms: —

"Now it is hereby agreed and fixed that, in case the said act shall pass into law, the said company shall pay to the said Sir *Thomas Stanley* the said sum of 20,000*l.* at the following times, and in the following manner, that is to say; the sum of 5000*l.* previous to the said company entering on the land for the purpose of commencing the formation of the said railway, and within three months from the day the said act of parliament shall receive the royal assent, and the sum of 10,000*l.* within twelve months from the day of the first mentioned payment, and the sum of 5000*l.* within twelve months from the day of payment of the said last before mentioned part. And that on payment of the said last mentioned sum of 5000*l.*, and not before, the said Sir *Thomas Stanley* shall execute, with all proper parties, a conveyance of such of his property as shall be required for the said railway as delineated and marked out in the plan so deposited, and that, in the formation of the said railway, such conveniences as the said Sir *Thomas Stanley* shall require for communication with the land on each side, and for hunting purposes, shall be made: and in case of any difference on this point, the same shall be left to his surveyor, and one to be appointed by the company, and of such

such third person as the two so named shall appoint, and the decision of any two of them shall be conclusive. *Richard Blundell, W. S. Miller:*"

That about the same time at which the scheme for forming the company, to be called "The *Birkenhead* and *Chester* Railway Company," was set on foot, another proposal was made by other parties for forming a railway between the same points — *Chester* and *Birkenhead* — but by a different line, and that it was proposed by them that application should be made to parliament for forming them into a company, with powers to make such railway, and which should be called "The *Chester* and *Birkenhead* Railway Company:"

That the proposed line of the proposed *Chester* and *Birkenhead* Railway also passed through the Plaintiff's estates, and that to such line the Plaintiff dissented:

That *Joseph Mallaby* was the solicitor for the intended *Chester* and *Birkenhead* Railway Company, and was authorised to act for them; and that two bills were in the session of 1837 introduced into the House of Commons, the one for forming the line which was to be called The *Birkenhead* and *Chester* Railway, and the other for forming the line which was to be called The *Chester* and *Birkenhead* Railway:

That both the bills were referred to the same committee of the House: and that in the course of their examination of the respective merits of the rival lines, one of the members of the committee proposed that it should be referred to Lord *Sandon* and Mr. *Wilson Patten*, two members of the committee, to determine which of the two lines should be adopted:

That

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said *Richard Bryan* and *Christopher Bentham* being two of the members of the committee acting for the promoters of the *Chester and Birkenhead* Railway Company Bill, and the said *George John Chamberlayne* and *Samuel Brittain* being two of the committee acting for the promoters of the *Birkenhead* and *Chester* Railway Company Bill; and the said *Richard Blundell* being the agent authorized to act for the Plaintiff:

That the engineer employed by the promoters of the *Chester* and *Birkenhead* line was Mr. *Stephenson*; and the engineer employed by the promoters of the *Birkenhead* and *Chester* line was Mr. *Walker*:

That the referees made their award, which was filed among the minutes and proceedings of the Committee of the House of Commons, and which was set out at length in the bill, and concluded in the following terms: — "We are therefore of opinion, that under provision that the line from the station to *Woodside Ferry* shall not be open to the public till the above mentioned communications to the other ferries has been secured by act of parliament and completed, Mr. *Stephenson*'s line will unite adequate accommodation at the least cost and local inconvenience, and should therefore be selected. Having no authority from the landowners, we have not felt ourselves at liberty to go in detail into the question of injuries apprehended by them from the respective lines. They will, of course, remain in full possession of the right of being heard before the committee, and stating their objections to either line. *Sandon, J. Wilson Patten*:"

That upon such award being made, the *Birkenhead* and *Chester* bill was withdrawn, and the bill for making a railway

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a railway from *Chester* to *Birkenhead* was passed by the House of Commons:

That the Plaintiff, relying on the agreement made between *W. S. Miller* on behalf of the *Birkenhead* and *Chester* Railway Company, and *Richard Blundell* on the Plaintiff's behalf, and so as aforesaid agreed to be adopted by the *Chester* and *Birkenhead* Railway Company, and not doubting that the same would be faithfully adhered to and executed by the *Chester* and *Birkenhead* Railway Company, assented to the bill for forming the *Chester* and *Birkenhead* Railway, and took no part in the further opposition that was made thereto in the House of Commons or in the House of Lords:

That the *Chester* and *Birkenhead* Railway Bill passed the House of Lords, and the Royal Assent was given thereto on the 12th of *July* 1837; and that, by the act of parliament so passed, it was enacted that certain persons therein named or described, of whom the said *Richard Bryan* and *Christopher Bentham* were two, should be united into a company for making and maintaining the said railway, and should be one corporate body, by the name and style of "The *Chester* and *Birkenhead* Railway Company."

The bill then proceeded to allege that the *Chester* and *Birkenhead* Railway Company had refused to perform the agreement made between *Miller* and *Blundell*, and it charged that, by the terms of the agreement for the reference to Lord *Sandon* and Mr. *Wilson Patten*, the Defendants adopted the agreement between *Miller* and *Blundell*, and took upon themselves all the liabilities under it of the promoters of the other line of railway; and that when the proposal for reference to Lord *Sandon* and Mr. *Wilson Patten* was under consideration between the

the several parties, *W. S. Miller*, acting as solicitor and agent of the line afterwards rejected, distinctly informed Mr. *Mallaby*, who was acting as the solicitor and agent of the promoters of the line which was adopted, and in the presence and hearing of Mr. *Blundell*, the Plaintiff's agent, of the existence of a contract or agreement with the Plaintiff, and although Mr. *Miller* declined to name the exact sum which, under such contract or agreement, was to be paid to the Plaintiff, yet he informed Mr. *Mallaby*, and also two of the persons acting as a committee for the *Chester* and *Birkenhead* Railway Company, that the sum was more than 15,000*l.*, but would not exceed 20,000*l.*, and that it was after they had distinct knowledge to that extent of the contract or agreement with the Plaintiff, that the agreement for reference to Lord *Sandon* and Mr. *Wilson Patten* was made and signed.

The bill further charged that by the line of road proposed to be formed by the *Birkenhead* and *Chester* Railway, only fourteen and a half statute acres of the Plaintiff's land would have been taken, whereas, by the line to be formed by the Defendants, sixteen and three-quarters statute acres were to be taken, and the rejected line was purposely laid down so as to avoid certain fox covers and preserves on the Plaintiff's estate, whereas the present line of the Defendants went through and destroyed two fox covers and preserves; and, in other respects, the line of the Defendant's railway did much greater injury to the Plaintiff and his estate, than would have been done by that line of railway, the formation of which was the subject of the agreement.

The bill prayed, that it might be declared that the agreement of the 17th of *January* 1837 was binding upon the Defendants, and that under it they were

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bound to pay to the Plaintiff, at the time and in the manner therein mentioned, the sum of 20,000*l.*; and that they might be decreed specifically to perform that agreement, and forthwith to pay to the Plaintiff the sum of 5000*l.*, and to pay him the sum of 10,000*l.* on the 13th of *October* next, being twelve months from the day when the first 5000*l.* ought to have been paid, and to pay the Plaintiff the further sum of 5000*l.* on the 13th of *October* 1839, and also to pay to the Plaintiff the costs of the present suit; the Plaintiff offering in all respects to perform and execute the agreement on his part; and that the Defendants might be restrained from entering upon the Plaintiff's lands until they should have paid him the full sum of 5000*l.*; and if they should not pay to him the sum of 10,000*l.* on or before the 13th of *October* next, then that they might be restrained from entering upon the Plaintiff's lands, and from proceeding with the formation of the railway in any manner over his lands after the 13th of *October* next, until they should have paid to the Plaintiff the full sum of 10,000*l.*; and if the Defendants should not pay to the Plaintiff the further sum of 5000*l.* on or before the 13th of *October* 1839, then that they might be restrained from entering upon the Plaintiff's lands, and from proceeding with the formation of the railway in any manner over the Plaintiff's lands after the 13th of *October* 1839, until they should have paid to the Plaintiff the further full sum of 5000*l.*

To this bill the Defendants put in a general demurrer, which the Vice-Chancellor over-ruled, and the Defendants thereupon appealed to the Lord Chancellor.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Walker*, in support of the demurrer, contended that the allegations in the bill were not sufficiently definite and certain to entitle the

the Plaintiff to any relief, and referred to *The Attorney General* v. *The Mayor of Norwich* (*a*) and *Kemp* v. *Pryor*. (*b*) They argued that it was impossible to understand from the bill what it was that the Plaintiff sought to compel the Defendants to do; and that it was impossible to suppose that Sir *T. Stanley* meant to assert the extravagant proposition that the Defendants were bound to take the fourteen and a half acres which were situate on the line which the railway would not now pursue; and that it was impossible to maintain that Sir *T. Stanley* was entitled to the benefit of the agreement between the solicitors of the rival companies, to which he was no party, even although his solicitor, or even he himself, might have written "approved" at the foot of that agreement. They insisted that, even supposing the agreement between the solicitors of the rival companies to be a contract of indemnity between the two companies, yet the agreement which Sir *T. Stanley* sought to enforce was an agreement which was to be performed by the rejected company, only in the event of their act of parliament passing and their intended line being sanctioned. They further observed that the Plaintiff did not offer to give up the sixteen acres, and that he might say, at the hearing, that he never intended to give them up.

*The* LORD CHANCELLOR.

The question for me to consider (arising as it does upon a general demurrer), is whether the bill does or does not state a case which, if proved, will, at the hearing, entitle the Plaintiff to some relief. The case, as it appears on the face of the bill, is one of the grossest frauds I have ever seen attempted. I have nothing

(*a*) 2 *Mylne & Craig*, 406. (*b*) 7 *Ves.* 237.

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nothing to do with the question whether Sir *T. Stanley* (the Plaintiff) has or has not an extravagant bargain. Sir *T. Stanley* entered into a certain contract with an intended railway company; [His Lordship read the substance of the contract]; but it being a matter of contest between that company and this which of them should have an Act of Parliament, an agreement was entered into between the two companies, pending this contest, by one of the terms of which it was provided that the adopted line should take the engagements entered into with the landholders by the rejected line. [His Lordship read this agreement]. The Plaintiff is no party to this agreement, but the allegation is, that it was approved and adopted by the promoters of the two companies, and by the Plaintiff, and that such approval was testified by the agreement being signed by two persons on behalf of each of the companies, and by the Plaintiff himself, through the instrumentality of an agent. What could be the meaning of the arrangement so made, if it was not that the Plaintiff was to look for performance of his contract to the existing company, instead of to the rejected company? [His Lordship read the allegation.]

It could mean but one of two things; viz., either that the agreement already existing between the Plaintiff and one of the companies should be considered as if entered into between himself and that company which should be actually selected by Parliament; or that, in order to relieve the company which should not succeed in obtaining an Act of Parliament, the contracts of that company should be executed by the company selected: and then, the company selected having obtained the concurrence of the Plaintiff in that agreement—although it certainly is not distinctly alleged that he assented to the bill on the faith of it—it is said that if you look to the original agreement, the land was to be taken only in case

case the rejected company succeeded in getting an Act of Parliament; and therefore we, the Defendants, will exercise the adverse powers of our Act of Parliament independently of that agreement.

Would any court of equity permit the company first to obtain the concurrence of the Plaintiff in an agreement like this, and then to turn round and say they will disregard it altogether, and put in force the adverse powers of the act, as if no such agreement was in existence?

I have no hesitation in saying, that, on the face of the bill, there does appear such a case as will entitle the Plaintiff to some relief. I cannot suppose that the company, as a body, will adopt a course which no individual member of the company would adopt. If I were to allow the demurrer, I should be saying that the company might go upon the Plaintiff's land, and give him for it only what a jury might award.

Demurrer over-ruled.

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Mr. *Temple* and Mr. *Loftus Lowndes* were counsel for the Plaintiff, but were not called upon.

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*Dec. 5, 6. 13.*

## GREENHALGH *v.* The MANCHESTER and BIRMINGHAM Railway Company.

The owner of land upon which a railway company empowered by parliament are about to enter, is not entitled to an interlocutory injunction to restrain them from so entering, if by his silence and conduct he has permitted the company to carry on their works upon the supposition that they were entitled to enter on and take the land in question.

IN the latter part of the year 1836, two joint stock companies were projected for the construction of distinct and independent lines of railway, to proceed from *Manchester* towards the South. One of these lines, to which was given the name of "The *Manchester* South Union Railway," was to terminate at *Tamworth* in *Warwickshire*: the other, under the name of "The *Manchester*, *Cheshire*, and *Staffordshire* Railway," was intended to connect the town of *Manchester* with the Grand Junction Railway, which it was to join near a place called *Rickerscote* in the county of *Stafford*.

The subscribers to the respective undertakings immediately adopted the usual measures for carrying their schemes into effect, by forming provisional committees, by appointing solicitors, agents, and engineers, by entering into contracts with the owners of property situate on the proposed lines, and by giving the requisite notices of their intention to apply for acts of parliament to confer on them the powers and privileges of incorporated companies.

On the 14th of *February* 1837, the Plaintiff, who was a proprietor of land, in the township of *Ardwick*, and lying in the proposed line of the *Manchester* South Union Railway, entered into an agreement, in writing, with three of the provisional committee of that undertaking, acting on behalf of themselves and the other subscribers, by which he agreed, at the price and upon the terms therein stated, to sell and convey to the company

pany the fee simple of two plots of land therein described, and containing together 7040 square yards; and it was thereby, among other things, provided that, in case the act for incorporating the subscribers as a company should not pass during the then present session of parliament, it should be lawful for the subscribers to vacate the agreement, on giving the Plaintiff three months' notice, and paying rent for the land up to the expiration of such notice: and further, that, in the event of any other company obtaining an act, for the purposes of which it might become necessary or desirable to sell the land to such company before the South Union Company should obtain their act, or in the event of the purchase not being completed within two years, the Plaintiff should be at liberty to vacate the agreement upon giving three months' notice.

In the parliamentary session of 1837, two bills were accordingly introduced into the House of Commons, one for constituting the company which was to be called "The *Manchester* South Union Railway Company," and the other for constituting the company which was to be called "The *Manchester*, *Cheshire*, and *Staffordshire* Railway Company." To the former of those bills the Plaintiff was an assenting party. Both bills were referred to the same committee of the House, and, after some investigation into the comparative merits of the respective lines, the committee recommended that the two bills should be consolidated, and that the subscribers to the two undertakings should be united so as to form one company. The necessary arrangements were made for carrying this recommendation into effect; and an agreement in writing was, in the month of *May* 1837, entered into and adopted by persons duly authorised to act on behalf of the promoters of the respective undertakings. By one of the clauses in that agreement,

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it was provided, that in every case where either company should have entered into any contracts or engagements with landowners whose property might be affected by whichever of the two projected lines might be adopted, though in a somewhat different mode, and the company projecting the accepted line should not (though the other company might) have made contracts with individual landowners, the contracts so entered into by the company proposing the rejected line, should be adopted by the united company, having regard to the different modes in which the property might be affected by the adopted line. On the 13th of *May* 1837, a copy of this clause in the agreement was sent to the Plaintiff by the solicitors acting on behalf of the united company.

In pursuance of the arrangements before mentioned, leave was given to consolidate the two bills, which was accordingly done; and the committee then reported to the House of Commons that the line adopted in the consolidated bill was partly that proposed for the *Manchester, Cheshire,* and *Staffordshire* Railway, and partly that proposed for the *Manchester* South Union Railway. So far as the Plaintiff's land was concerned, the line adopted was the line which had been proposed to be taken by the *Manchester, Cheshire,* and *Staffordshire* Railway; and the Plaintiff, relying, as he stated in one of his affidavits in this cause, on the before mentioned clause in the agreement of *May,* and on the faith that the united company were bound to perform the contract of the 14th of *February* 1837, instead of opposing, gave his assent to the new bill. On this point, however, the affidavits were conflicting, there being some evidence to shew that the Plaintiff's name was not included among the assents, but was returned in the list as neutral. The new bill afterwards passed both houses of parliament,

and

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and finally received the Royal Assent on the 30th of *June* 1837. By the act so passed, the persons therein named, and all other the subscribers to the two proposed railways, were incorporated under the name of "The *Manchester* and *Birmingham* Railway Company," for making and maintaining the railway therein described; and the usual powers for purchasing and holding lands for the purposes of the undertaking, were thereby conferred on the company. Shortly after the passing of the act, some written communications passed between the Plaintiff, or his solicitor, and the solicitors of the new company, with reference to his contract with the South Union Company; and, on the 7th of *October* 1837, he received from the chairman of the provisional committee of the proposed South Union Railway Company, a formal notice, dated the 18th of *September*, that the subscribers to the agreement between that company and the Plaintiff, would vacate that agreement as on *Christmas* day then next. On the 5th of *December*, in the same year, he received a letter from the chairman of the board of directors of the *Manchester* and *Birmingham* Railway Company, informing him that the company's engineers were about to enter upon his land, for the purpose of staking out the line, and taking the levels and surveys by which the quantity of ground required by the company would be determined; and that as soon as the chief engineer should have reported to the directors what portion of his property would be required for the railway, they were desirous of treating with the Plaintiff for the purchase of it.

On the the 23d of *January* 1838, the Plaintiff sent a letter to the chairman of the *Manchester* and *Birmingham* Railway Company, in which he inquired whether the company intended to hold him to his contract with the projectors of the South Union line, and if not, what

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what quantity of his land they would require. The terms of this letter are fully stated in the judgment. On the 15th of *June* 1838, a communication was made by the Plaintiff's solicitor to the solicitor for the *Manchester* and *Birmingham* Railway Company, contending that the contract of the 14th of *February* 1837 was binding on the company, and refusing to treat with them on any other basis, and at the same time threatening to take proceedings to enforce the contract; and on the 26th of the same month, the solicitor for the company stated, in reply, that any such proceedings would be resisted.

On the 6th of *August* 1838, the Plaintiff was served with a notice from the *Manchester* and *Birmingham* Railway Company, stating that the company intended, under the provisions of their act, to take the land of the Plaintiff described and delineated in a schedule and plan annexed, and requiring him to treat with them for the sale of such land, and also for any compensation he might claim; and intimating that, in case of his refusal to do so within ten days, a jury would be impannelled, to assess the value of such land, and also such compensation.

The Plaintiff thereupon filed the present bill against the *Manchester* and *Birmingham* Railway Company, praying a declaration that the agreement of the 14th of *February* 1837, with the subscribers to the *Manchester* South Union Railway, was binding upon the Defendants; and that they might be compelled specifically to perform it; and that an injunction might, in the meantime, be issued to restrain them from taking any proceedings in respect of his land under the powers contained in their act of parliament.

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An *ex parte* injunction, obtained during the long vacation, was afterwards, upon argument, dissolved by his Honor the Vice-Chancellor, principally on the ground that the projectors of the South Union Line, having failed in obtaining their act of parliament, and having afterwards determined their contract with the Plaintiff by a notice, the Plaintiff had no equity to enforce that contract against the new company.

The Plaintiff appealed against his Honor's order dissolving the injunction.

Upon the appeal-motion before the Lord Chancellor, the argument proceeded partly on the ground upon which his Honor had rested his judgment in dissolving the injunction, and partly also on the conduct and dealings of the Plaintiff with the Defendants, and with other persons, relative to his land, subsequently to the passing of the act of parliament, and which, it was contended, were of such a nature as to deprive the Plaintiff of any title to the interlocutory interposition of the Court by injunction. The material circumstances constituting this part of the case, and upon which exclusively the Lord Chancellor disposed of it, are stated in his Lordship's judgment.

Mr. *Wigram* and Mr. *Sharpe*, for the Plaintiff.

The *Solicitor-General*, Mr. *Knight Bruce*, Mr. *Koe*, and Mr. *Loftus Lowndes*, for the Defendants.

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*The* LORD CHANCELLOR. *Dec.* 13.

This case, though it occupied two days in discussion, and the affidavits are exceedingly numerous, and branch out

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out into a variety of facts and statements, many of which are utterly irrelevant, turns entirely upon two questions; first, whether the company which obtained the act, and is now the existing company, is or is not bound by the contract entered into by the projectors of the South Union Company; and secondly, whether, if the Plaintiff ever had any right against the existing company, anything has taken place to prevent him from asserting that right by means of an interlocutory injunction.

In the view which I take of the case, it is not necessary for me to give any opinion upon the first point: and I am not sorry to be relieved from that duty; for the question is one of very great nicety and difficulty, and therefore not to be decided, except in a case in which it is absolutely necessary, for the purposes of justice, that it should be decided. And I find in this case what appear to me to be very safe grounds upon which to dispose of it, without at all touching upon that point; and, for the purpose of explaining the grounds of my decision, I will assume that the Plaintiff had a right against the existing company, which he might have enforced in the manner alleged by the bill. I assume that for the purpose of argument merely, and not for the purpose of laying down any rule as to any future case which may occur.

The second question then is, supposing that right to have existed when the act of parliament passed, in *June* 1837, whether anything has since taken place between the parties, that is to say, between the month of *June* 1837, and the month of *June* 1838, when the contest between the parties arose, to deprive the Plaintiff of the right to the protection of this Court by injunction. The right, if it existed, of course existed at the time when the act passed. Now the right is not, properly speaking,

a right

a right of contract, but rather arises out of the contract; for neither in this case, nor in the case of *Edwards* v. *The Grand Junction Railway Company* (*a*), was it a matter of contract; but the equity is this, that what has subsequently taken place, and the position in which the parties stand, give the party seeking the benefit of the contract a right to the interference of this Court, by virtue of an equity which induces the Court to prevent the company from exercising their legal right, unless upon the terms of adopting and giving effect to the contract which has been entered into by other parties.

In considering how far a party has, by his own conduct, lost the benefit of an equity to which he was once entitled, it is obvious that very different considerations attach to a case in which a party has been all along cognizant of his rights, from those which attach to a case in which he was not so cognizant. If the case should arise in which both parties were ignorant of the right which one of them, had he been aware of it, might have asserted, it might be open to considerable question how far that ignorance ought to prejudice him. But if the Plaintiff is cognizant of his right, of course he cannot be heard to say that he did not assert it sooner in consequence of his not being aware of the advantage to be derived from asserting it. The Plaintiff has relieved the Court from this difficulty; for in a late affidavit, filed so recently as the 24th of *November* last, he states that amongst his papers he found a letter which he sent on the 7th of *October* 1837 to the solicitor of the South Union Company, when he first received notice of the intention of that company to determine the tenancy created by his contract. In this letter, sent in answer to the notice, he says, "I take the liberty to object to it, principally for two reasons, which at

(*a*) 1 *Mylne & Craig*, 650.

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at first view your own mind will admit as valid; first, because, if your ideas be correct, that you can vacate the agreement, the term of contract cannot expire before *March* next, as your notice was not delivered until to-day, being eight days after the quarter day; but secondly, and mainly, because you are not at liberty, as you and your clients well know, to annul the agreement, as the act has been obtained, and the respective shareholders, as recent advertisements attest, are, each and all, amenable in law to the united acts of the amalgamated company, or the prior respective acts of each company." So that he tells us in his own affidavit that, on the 7th of *October* 1837, he was aware of his equity, and was prepared to assert it. Whether that were so or not might be a matter of some doubt, if it were material to inquire into the accuracy of that statement—I say the *accuracy*, because I find an attempt to support the statement by evidence which throws infinite doubt upon the truth of it altogether. The Plaintiff not only himself swears to a letter not forthcoming, which he never adverted to before, though this is the third affidavit he has made; but he attempts to establish and confirm it by the affidavit of *Thomas Wilson*, his shopman, who swears to a copy of the letter, without saying he ever read or compared it. *Wilson* says that he was employed to deliver the letter, and that the following is a copy of such letter; and he then sets out a copy in the same words as are to be found in the Plaintiff's affidavit, without giving any explanation or information as to how he is enabled to make the affidavit, and swear to the words of a letter which he was only employed to deliver. Still it may be true; but it is not material to inquire into its truth, because, after having made that statement, the Plaintiff is precluded from saying that he was not perfectly aware, in the month of *October* 1837, of the equity which he is now seeking to assert; and his

his conduct therefore must be looked at as the conduct of a party fully cognizant of his rights.

In considering the evidence, two things must be borne in mind, namely, the fact, undisputed, that, upon the union of the two companies, it was part of the arrangement between them, that the company which parliament might sanction should, as far as was practicable and consistent with their scheme, adopt all contracts made by the other parties: and secondly, that, quite independently of enforcing the contract for the purpose of completing the purchase of the Plaintiff's land, there was a question existing (adverted to indeed in that very letter), between the Plaintiff and the South Union Company, not as to the completion of the purchase, but as to the continuance of the tenancy, a question that depended upon the validity of the notice to quit. Now that arrangement, forming part of the contract, appears to have been communicated to the Plaintiff. If, therefore, he thought he had a right to enforce the contract, he must have been, at all events, aware, that there was a chance, at least, that the company which obtained the sanction of parliament, and was brought into legal existence by the act, might, to a certain degree, adopt the contract into which he had entered with the South Union Company. Nothing had passed to prevent them from adopting the contract, if they thought it expedient to do so. It was a point not decided, but remaining entirely open, whether, if the Plaintiff had not a right to enforce his contract in equity, he might not still obtain the benefit of it, from the new company choosing to take it upon themselves.

Now, on the part of the Defendants, the company, certain facts are stated, which, if left unexplained, undenied, unqualified, and not in some way or other displaced

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displaced by the statements on the part of the Plaintiff, would, I apprehend, be quite conclusive against the right which the Plaintiff is now asserting. In the *December* following the passing of the act, the usual course was adopted: circular notices were sent intimating to all persons who received them, and amongst others to the Plaintiff, the intention of the company to proceed under the powers of the act of parliament. In *January* 1838 that notice was followed by marking out the land to be taken. In the month of *May* other transactions take place: between *January* and *May* whatever was necessary to be done prior to the actual commencement of the work was done; the line was surveyed, and the ground marked out; and in the course of that time the Plaintiff is stated to have applied on various occasions to the officers of the company, to know what quantity of his land they would require in carrying their act of parliament into operation. It is also proved, that in treating with a brickmaker, a conversation took place which would shew that he contemplated dealing with the land as his own property, except only as to so much as the company might require for their line.

These facts, which are not a matter of dispute, would bring the Plaintiff into this position, viz., that with knowledge of his supposed equity, he not only permitted the Defendants to act in exercise of their legal rights, and therefore without reference to his contract, but permitted them to proceed to a considerable extent in the execution of their intended line; whereas, as is stated, and not contradicted, if it had been thought expedient, and the Plaintiff had asserted his right, it would have been quite as easy for the company, under the provisions of the act, to adopt a line which would have avoided any contact with the Plaintiff's land. The affidavits filed on the part

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part of the company fall short in not stating what the company actually did; but it is obvious from what is stated, that a great deal must have been done between *January* and *June*, when the Plaintiff first asserted his right to an injunction. The mere expense of engineering in marking out the line of railway over the Plaintiff's land, though probably not much in itself, was necessarily connected with the whole line, the engineering expenses of which must have gone to a very considerable extent. Then in *May* advertisements were published for receiving tenders for contracts for the works, although the affidavits do not state that any such contracts were made.

The Plaintiff meets this case by saying, that whatever the company may have done was not induced by anything which he did; that he was not only aware of his right, but that he uniformly declared his intention of acting upon it, and frequently and openly communicated that intention to the company; and that whatever they did, therefore, was done with their eyes open. This was in argument put in the form of a statement, perfectly true in fact, that the parties with whom the contract was made, and with whom these communications took place, namely, the projectors of the South Union line, had become actually members of the incorporated company under the act of parliament, and that the notice brought home to them in the one character must necessarily affect them in the other. So far as notice and knowledge go, that observation is perfectly true; but the question between these parties is not one of notice or knowledge: it depends upon the dealings of the Plaintiff with those who represented the two companies. If the Plaintiff communicated to the directors of the South Union Railway Company an intention of enforcing against them in that character any rights he might be entitled to, and if,

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dealing with those who represented the existing company under the act, he not only abstained from making any claim on that body, but permitted them to proceed, and became, by communications with them, a party to an understanding that they were at liberty to proceed without being in any way affected by his contract with the South Union Company, that would deprive him, not of the right of enforcing the contract against the South Union Company, but of the right which he now asserts, of interfering with the operations of the new company under the authority of the act of parliament.

A great part of the evidence which the Plaintiff has adduced, consists of communications between himself and others, for the purpose of shewing what was present to his own mind, and what his own intention was. Now, as I have before remarked, the question does not depend upon what was in the Plaintiff's mind, but upon what was the effect of the course of conduct pursued by the Plaintiff on the minds of those who constitute the existing company. I cannot, however, but observe that the Plaintiff's affidavits, and some other affidavits produced on his behalf, furnish very strong reason for supposing that what did take place was, not with reference to asserting a right against the *Manchester* and *Birmingham* Railway Company, but had a very different object, and was addressed to an entirely different subject. Bearing in mind that, according to his own allegation, the Plaintiff always intended to assert his right against the existing company; and also bearing in mind that an agreement existed which made it probable, or at least possible, that he might have the benefit of a voluntary adoption by the existing company of his contract with the South Union Company, expressions, I think, occur which shew that he did not contemplate enforcing his contract adversely against the existing company, but that he thought it probable

probable they would adopt the contract of the South Union Company. [*The* LORD CHANCELLOR here read and commented upon several passages in the affidavits which he considered as corroborating this view of the case.]

Then there is that on which there can be no mistake in point of fact; I mean the Plaintiff's letter of the 23d of *January* 1838. That letter was addressed to the chairman of the new company, and was in these terms:— "Being applied to by a wealthy gentleman for the whole of my land, &c., in *Ardwick*, as marked blue on the accompanying plan, I respectfully presume to request that you, as chairman of the *Manchester* and *Birmingham* Railway Company, will kindly answer the subjoined queries. 1st. Does the United Company design to maintain the contract entered into between me and the South Union Company, or am I perfectly free from it by the notice sent. 2dly. If the contract is not binding, please say as nearly as you can, what quantity of my land, &c. will be required. 3dly. As certain portions of my property are available by the company, shall I subject myself to any legal difficulty by a disposal of the entire, if the application, as above, shall be urged. If an immediate reply cannot conveniently be given, by informing the bearer when, at the earliest, you will furnish it, you will greatly oblige yours, &c. *J. Greenhalgh.*"

Here then is a letter which, if there were any ambiguity in the transaction previously, would be quite sufficient to remove it. It is impossible to believe that the man writing that letter thought he had a contract with the company which, as against them, he was entitled and able to enforce. He puts it to them in a manner quite consistent with the case of their having an option, not binding upon them, but of which he would be glad to

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avail himself if they chose to exercise it, but utterly inconsistent with the notion of his having a right, or rather, intending to enforce that right adversely against them. In his affidavit he tells us he knew of his right; and yet here was a distinct communication, passing between the parties in *January* 1838, in which he surrenders that right, putting it to them, what quantity of land they will take, and leaving it to them to say, whether they will perform the contract or not. Well, after that communication between the company and the Plaintiff, with that letter in their hands, setting them entirely at liberty, they proceed with their work — to what extent does not appear — till *June*, and never till the month of *June* is the Plaintiff's title asserted. Upon that state of evidence, I have no hesitation in saying, that the Plaintiff is not entitled to the injunction of this Court to prevent another party from carrying on the work which by his silence and conduct he has permitted that other to carry on, at all events, from *January* to *June*.

If I entertained more doubt than I do on this subject, I should be very much influenced by considerations similar to those which weighed with me in deciding the *Liverpool* case (*a*); because, where the question is as to interposing by injunction to protect a right which in itself is doubtful or disputed, it must always be considered on which side the balance of danger preponderates. If the contract be a contract binding on the existing company — and that is the question between the parties — the Plaintiff is not precluded from attempting to establish it. What the company are doing, is to take part of the Plaintiff's land under the powers of their act of parliament; and this, if done adversely against the Plaintiff, will

(*a*) *The Attorney-General* v. *The Mayor of Liverpool*, 1 *Mylne & Craig*, 171.

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will not preclude him, should he establish his right at the hearing, from compelling them to take the whole of his land, under the contract. But if, on the other hand, the evidence were more doubtful than it is, the granting of the injunction in the mean time would certainly produce irreparable injury to the other party, in case it should ultimately turn out that the Plaintiff has not that right which he asserts that he has. It cannot be supposed that the Plaintiff should stop the Defendants' works until this cause shall have been heard. At the same time the company should be well aware that that would be no answer, if a claim can be established against them upon the contract. The case is only one in which there being a doubt what the ultimate rights of the parties will prove to be, the Court is in infinitely greater danger of doing injustice by granting the injunction than by refusing to grant it.

This case came before me, however, not properly by way of appeal from the judgment of the Vice-Chancellor. His Honor dissolved the injunction without costs; and the parties have wisely added to their notice of motion that which amounts to a new motion, if I should be of opinion that the Vice-Chancellor's decision was right. I say they have *wisely* done so; because, looking at the affidavits upon which the injunction was obtained, if the case were brought before me as a question of sustaining an *ex parte* injunction, I should have no hesitation in dissolving it upon the demerits of the affidavit upon which the injunction was obtained. My first ground would be the unqualified way in which the Plaintiff states that his assent to the South Union line was used as a means of obtaining the act; but what I should principally rely upon, if asked to sustain the *ex parte* injunction, is the way in which the Plaintiff drops all mention of what took place after the month of

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*December* 1837. His affidavit, verifying the allegations of the bill, states, that subsequently to the 5th of *December* 1837, an application was made to him to state what claim he made upon the company; and then comes the letter of the 15th of *June* 1838, representing that, from the month of *December* 1837 to the month of *June* 1838, he uniformly insisted upon his contract, and refused to treat upon any other basis; whereas there is clear evidence to the contrary. I consider this as a misrepresentation of what really took place; and if that had been properly stated to the Court, the injunction would not have been granted.

The only doubt I have felt is with regard to costs. The facts which are free from doubt are quite sufficient to induce me to refuse the motion; but there are many very important facts, the truth of which it is impossible to ascertain in the present state of the cause; and upon the whole, although I do not think that the conduct of the Plaintiff has been such as the Court had a right to expect, particularly with regard to his first affidavit, I shall refuse the motion without costs.

AN

# INDEX

TO

# THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

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## ANSWER.



## APPEAL.



## APPOINTMENT OF TRUSTEES.

clear sum of 10,000*l.* by means of the sale or of the bond, and should, at the request and direction of the husband and wife, or the survivor, in writing first made for that purpose, have remitted the same to *England*, to *B.*, *C.*, and *D.*, in the best, and as to him, his executors, &c. should seem the most eligible manner, he should stand discharged of the trusts, and should not be answerable for the payment of the bills in which the same should be remitted: and it was declared that *B.*, *C.*, and *D.* should invest the money in government or real security, upon trust for the husband for life; with remainder for the wife for life; with remainder for the children of the marriage; and and that *A.*, until the sale, should be seised of the premises, and, after the sale, and until the monies should be remitted, should be interested in the proceeds, upon the same trusts as were before declared concerning the 10,000*l.* to be remitted to the trustees.

The property was sold in the year 1811 for 145,000 sicca rupees, and the purchase-money was, in 1813, received by *A.*'s house of business in *Calcutta*, who were the agents of the husband, and who then, by the direction of *A.*, set apart 80,000 sicca rupees, being then equal in value to 10,000*l.* sterling, and carried the same to the account of *A.* and another person, as trustees of the settlement, and held the remainder of the purchase-money to answer the husband's drafts.

In 1818 *A.* retired from the house of business. In 1825 he died. In 1826 the husband requested the surviving partners of *A.* to invest the 80,000 sicca rupees in a note of the *East India* Company, which they did, in the names of their firm. In 1827 the husband died. In 1832 the wife required *A.*'s executors, who were in *England*, to procure a remittance of the 10,000*l.* to *England*; whereupon they directed the house of business to transmit that amount in bills, payable to *B.* and *D.*; *C.* being dead. The house of business thereupon sold the note of the *East India* Company, and drew a bill upon their correspondents in *London*, payable to *A.*'s executors: but before the bill became due, both the house in *Calcutta* and their correspondents in *London* had failed, and the bill was never paid. Except as before mentioned, no request was ever made by the husband and wife, or the survivor, to remit the money.

Upon a bill by the children of the marriage against *A.*'s executors, it was held that *A.*'s estate was liable to make good the sum of 10,000*l.* sterling. *Bacon* v. *Clark*. Page 294

*See* LEGACY.
LIABILITY OF EXECUTORS.
TRUST.

CON-

## CONSTRUCTION.

heirs or assigns of the survivor, should pay the rents, issues, and profits of *the said hereditaments* to *Sarah S.*, wife of *George S.*, or otherwise permit and suffer her to use and occupy *the said hereditaments* during her life, to the intent that the same *hereditaments* and the rents, issues, and profits thereof might be for her sole and separate use, &c.; and after her decease in trust for *George S.*, for his life; and after his decease upon trust that the trustees or the survivors or survivor of them, and the heirs and assigns of such survivor, should be possessed of and interested in *the said hereditaments*, in trust for such persons, of a certain class, as *Sarah S.* should by will appoint, and, in default of appointment, upon trust, that the trustees or the survivors or survivor of them, and the heirs or assigns of such survivor, should sell and dispose of *the said hereditaments and premises*; and the testatrix directed, that the produce of the sale should form part of her residuary personal estate: Held, that no beneficial intent in the furniture and effects passed by the will.

The testatrix devised certain freehold premises in which she carried on trade, to trustees in fee, upon trust, (after the decease of a person to whom she gave the beneficial interest therein for life,) to dispose of and divide the same unto and amongst her (the testatrix's) partners, who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit or deem advisable. The testatrix disposed of her business in her lifetime: Held, that the devise in favour of the persons to whom she might have disposed of her business, was not void, either under the Statute of Frauds, or on the ground of uncertainty.

The testatrix being entitled to the sum of 2000*l.*, secured by a promissory note which had two years to run, indorsed the note to *Sarah Sargon*, and sent it to her with a letter, in the following terms: — "The enclosed note of 2000*l.* I have given to Mrs. *Sarah Sargon* for her sole use and benefit, independent of her husband, for the express purpose of enabling Mrs. *Sargon* to present to either branch of my family any principal or interest thereon, as the said Mrs. *Sarah Sargon* may consider the most prudent; and in the event of the death of Mrs. *Sarah Sargon*, by this bequest I empower her to dispose of the said sum of 2000*l.* and the interest by will or deed, to those or either branch of the family she may consider most deserving thereof. To enable Mrs. *Sarah Sargon*, my niece, to have the sole use and power of the said sum of 2000*l.* due to me by the above note of hand, I have specially indorsed the same in her favour." It being

## DISCLAIMER.



## DISCOVERY.

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*land*, formed under the provisions of the 6 *G.* 4. *c.* 42., filed his bill in this Court on the 6th of *March* 1838, against certain persons as the directors, and against the public officer of the company; alleging that he had been induced to purchase the shares through the misrepresentations and fraud of the directors, and that, on the 19th of *January* 1838, they had commenced an action against him in the Court of Exchequer in *England*, in the name of the public officer, for the recovery of the instalments due on his shares, which action would come on for trial at the assizes to be holden at *Liverpool* on the 22d of *March* then instant; and praying a discovery and injunction, and that the monies which he had previously paid for shares might be refunded. To this bill the public officer duly appeared, but on the 16th of *March* the common injunction was obtained against the other Defendants for want of appearance. The Plaintiff then moved that the injunction might be extended to stay trial of the action commenced by the Defendants the directors, in the name of the other Defendant; and upon this motion, besides the usual affidavit of the Plaintiff, there were read an affidavit by the Plaintiff's attorney in the action, stating the delivery of the declaration and certain proceedings which had subsequently taken place at law, with a view to explain the apparent delay in the institution of the suit; and also an affidavit by the Defendant, the public officer, setting forth the constitution of the company, and the frame and nature of the pleadings in the action.

The Vice-Chancellor granted the motion, but his Honor's order was discharged upon appeal, the Lord Chancellor holding,

First, that the order was contrary to the practice and irregular in form, inasmuch as the common injunction had never been obtained against the public officer, the Plaintiff at law.

Secondly, that the order ought not to have been made, because it appeared upon the whole case taken together, that the allegation in the Plaintiff's affidavit, that the discovery sought by his bill was material to his defence at law, could not be true in fact; and,

*Semble*, thirdly, that the delay between the time of the commencement of the action and the institution of the suit was not sufficiently accounted for, to justify the Court in extending the injunction so shortly before the trial.

In what cases, and how far affidavits may be used, upon such a motion, on behalf of the Plaintiff to explain his apparent delay in instituting the suit, or on behalf of the Defendant to state the nature and effect of the proceedings at law, for the purpose of shewing that the discovery to be made by the answer would not be material

## INSPECTION OF DOCUMENTS.



## INTEREST.

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JOINTURE.

*See* MARRIED WOMAN.

JOINT STOCK COMPANY.

*See* INJUNCTION, 3.

JOINT TENANCY.

*See* WILL, 4.

JUDGMENT.



*See* POWER.

JUDGMENT DEBT.

*See* INTEREST.

JURISDICTION.



*See* BOTTOMRY BOND.
SPECIFIC PERFORMANCE.

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LEGACY.

MARRIED

## PORTION.

dies at the death of the survivor of them, upon trust for all and every such child and children, in such shares and manner as the husband and wife should appoint, and, in default of appointment, equally; and in case there should be no such child or children of the husband by the wife, or there being such, all of them should happen to die in the lifetime of *A.*, upon trust for such persons as the wife should appoint; and in default of appointment, for the survivor of husband and wife, and the heirs and assigns of such survivor, during the remainder of the life of *A.*

It was by the same deed provided, that when the wife attained her full age, a recovery should be suffered, which should enure to the use of trustees during the life of *A.*, upon the several trusts before mentioned; and after his death, and for want of issue male of his body, as to part, to the use of trustees, in trust for the wife for life, for her separate use, with remainder to the use of the husband for life; and as to the other part, to the use of the husband for life; and in case his wife survived him, then as to the whole of the property to the use of the wife for life, with remainder to the use of trustees, during the several lives of husband and wife, to preserve contingent remainders, with remainders to trustees for 500 years thence next ensuing, with remainder to such son of the marriage as husband and wife should appoint, in tail, with remainder to the use of the first and other sons of the marriage, successively, in tail, with remainder to the use of the daughters of the marriage, as tenants in common, in tail, with remainders over. It was declared, that the trustees of the 500 years term should stand possessed thereof in case the husband should happen to die, leaving issue by the wife, an eldest or only son, who should live to attain twenty-one, or die before and leave such issue, and one or more younger son and sons, and daughter and daughters, or daughter or daughters only of the marriage, upon trust, that the trustees should, after the several deaths of the husband and wife and the commencement of the term, but not before or sooner, unless the husband should by writing direct, but without prejudice to the estates and interests of the wife, raise for the portion or portions of the daughter and daughters, and younger child and children of the marriage, there being then an elder or only son, or the heirs of the body of such son then living, the several sums next thereinafter mentioned, *viz.* if only one such younger child, 2000*l.*, if two, 3000*l.*, and if three or more, 4000*l.*, for the portions of such younger children, share and share alike, and to survive to the survivors and survivor of them, but so as such two surviving younger

An

## PRIVILEGED COMMUNICATION.

## PRO CONFESSO.



## PRODUCTION OF DOCUMENTS.

## RECEIVER.



## REFUNDING OF LEGACIES.

## REHEARING.



*See* APPEAL.

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## STATUTES.



## STATUTE OF LIMITATIONS.

A direction in a will for the payment of debts does not create a trust upon the personal estate, so as to take a debt out of the statute of limitations, so far as relates to that estate.

If time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted. *Freake* v. *Cranefeldt.* 499

## STAY OF PROCEEDINGS.

A residuary legatee filed a bill against the personal representatives of a testator, for an account and payment. Before decree in that cause, a creditor of the testator, upon a bond, in respect of which no interest had been paid, or acknowledgment of debt made for upwards of twenty years, filed a creditor's bill against the same representatives; and the Defendants, by their answer to the second bill, admitted the existence of the bond debt. Afterwards, the Plaintiff in the first cause obtained the common decree in a residuary legatee's

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## TAXATION OF SOLICITORS' BILL.

*See* PRACTICE, 10.

## TRUST.



*See* CORPORATION.
WILL, 2. 6.

## TRUSTEES.

*See* ANSWER.
APPOINTMENT OF.
BREACH OF TRUST, 1.
CHARITY, 1, 2.
COSTS, 1.
LIABILITY OF EXECUTORS.

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## UNCERTAINTY.

*See* WILL, 2.

UN-

## UNCLAIMED DIVIDENDS.

When stock has been transferred to the Commissioners for the Reduction of the National Debt, in consequence of the dividends upon it not having been claimed for ten years, it is not a matter of course to order it to be re-transferred to a person who subsequently makes out a legal title, upon which a transfer of the stock would have been made to him if the ten years had not elapsed.

Thus, where stock had stood in the joint names of two persons, of whom one had survived the other upwards of ten years, but had not, during that time, claimed any dividends, the Court would not, upon the petition of the widow and personal representative of the survivor, order the stock to be transferred into her name, or into the names of the two deceased persons; but directed the Master to inquire who was entitled to the stock, with liberty to state special circumstances. *Ex parte Ram.*

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*See* BANKRUPTCY, 2.

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## VESTING.

*See* PORTION, 1.

## VENDOR'S LIEN.

If the same person is agent both for the vendor and purchaser, or is himself vendor and agent for the purchaser, whatever notice he may have will affect the purchaser; and a purchaser taking a conveyance from a vendor, who has not possession of the title-deeds, will take it with notice of any claim which the party in possession of the title-deeds may have.

The benefit of the vendor's lien for purchase money unpaid may be assigned by parol to a third party; *Semble. Dryden* v. *Frost.*

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## WAIVER.

*See* MORTGAGE.

## WILL.

1. Bequest of a residue upon trust for the testator's grandson, *B.*, the son of *Isaac*, at twenty-five, for life; and, after the death of *B.*, in case he shall have a son who shall attain twenty-one, then for such son of *B.*, who shall first attain twenty-one, absolutely; and in default of such son of *B.*, and after *B.*'s death, then upon trust for the testator's grandson, *J.*, the son of *Isaac*, at twenty-five, for life; and after the death of *J.*, in case he shall have a son who shall attain twenty-one, then to such son of *J.* who shall first attain twenty-one, absolutely: with the like limitations successively in favour of any other grandsons, sons of *Isaac*, born in the testator's lifetime,

lifetime, and their respective sons first attaining twenty-one; and in default of a son of any such grandson attaining twenty-one, then upon trust for any son of *Isaac*, born after the testator's decease, who shall first attain twenty-one, absolutely; and in case no son of any son of the testator's son *Isaac*, then born, or thereafter to be born in the testator's lifetime, nor any son of his son *Isaac*, born after his decease, shall live to attain twenty-one, then from and immediately after the decease of all the sons and grandsons of his son *Isaac*, upon trust for the testator's nephew, *G.*, for life; and upon the decease of his nephew, *G.*, in case he shall have a son who shall live to the age of twenty-one, then upon trust for such son who shall first attain twenty-one, absolutely.

Held, upon the whole context of the will, that the words "after the decease of all the sons and grandsons," must be read as if they had been "after the decease of all the *aforesaid*," or "all *such* sons and grandsons;" and that the limitation over in favour of the first son of *G.* attaining twenty-one, was therefore not too remote. *Ellicombe* v. *Gompertz*.

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2. A testatrix devised to trustees, their heirs and assigns, her copyhold dwelling-house, garden, and ground, *together with the furniture and effects therein*, and the coach-house and stable thereto belonging; and also the ten cottages, and two new cottages built by her, with their appurtenances, at *L.*; to hold the same with the appurtenances, unto and to the use of the trustees, their heirs and assigns, upon trust, that they or the survivors or survivor, or the heirs or assigns of the survivor, should pay the rents, issues, and profits of *the said hereditaments* to *Sarah S.*, wife of *George S.*, or otherwise permit and suffer her to use and occupy *the said hereditaments* during her life, to the intent that the same *hereditaments* and the rents, issues, and profits thereof might be for her sole and separate use, &c.; and after her decease in trust for *George S.*, for his life; and after his decease upon trust that the trustees or the survivors or survivor of them, and the heirs and assigns of such survivor, should be possessed of and interested in *the said hereditaments*, in trust for such persons, of a certain class, as *Sarah S.* should by will appoint, and, in default of appointment, upon trust, that the trustees or the survivors or survivor of them, and the heirs or assigns of such survivor, should sell and dispose of *the said hereditaments and premises;* and the testatrix directed, that the produce of the sale should form part of her residuary personal estate: Held, that no beneficial intent in the furniture and effects passed by the will.

The testatrix devised certain freehold

END OF THE THIRD VOLUME.

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